22-1589

United States Court of Appeals

Second Circuit

REVITALIZING AUTO COMMUNITIES ENVIRONMENTAL RESPONSE TRUST, RACER PROPERTIES LLC, EPLET, LLC, NOT INDIVIDUALLY BUT SOLELY IN ITS REPRESENTATIVE CAPACITY AS ADMINISTRATIVE TRUSTEE OF REVITALIZING AUTO COMMUNITIES RESPONSE TRUST

Plaintiffs-Appellants,

vs.

NATIONAL GRID USA, NIAGARA MOHAWK POWER CORPORATION, CARRIER CORPORATION,
Caption continued on back of page

Appeal from a Judgment of the
United States District Court for the Northern District of New York

BRIEF OF PLAINTIFFS-APPELLANTS

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UNITED TECHNOLOGIES CORPORATION, CARLYLE AIR CONDITIONING COMPANY, INC., GENERAL ELECTRIC COMPANY, FKA GENERAL ELECTRIC CORPORATION, BRISTOL MEYERS SQUIBB COMPANY, MAGNA POWERTRAIN USA, INC., SOLVENTS AND PETROLEUM SERVICE, INC., THOMPSON CORNERS, LLC, METALICO SYRACUSE REALTY, INC., METALICO NEW YORK, INC., GARDNER DENVER, INC., ONX1 LLC, ONONDAGA POTTERY COMPANY, INC., AMPARIT INDUSTRIES, LLC, 6181 THOMPSON ROAD, LLC, CARRIER CIRCLE BUSINESS COMPLEX LLC, TELESECTOR RESOURCES GROUP, INC, WESTERN ELECTRIC COMPANY, INCORPORATED, SYRACUSE LEPAGE LLC, LENNOX INDUSTRIES INC., SYRACUSE DEERE ROAD ASSOCIATES, LLC, JAGAR ENTERPRISES, INC., CALOCERINOS AND SPINA, C & S ENGINEERS, INC., B&B FAMILY LIMITED PARTNERSHIP, HAULER'S FACILITY LLC, 6223 THOMPSON ROAD SUITE 1000 SYRACUSE, NY 13206, HONEYWELL INTERNATIONAL INC., 80 STATE STREET ALBANY, NY 122072543, LOCKHEED MARTIN CORPORATION, 6801 ROCKLEDGE DRIVE BETHESDA, MD 20817, NEW PROCESS GEAR, INC., 6600 NEW VENTURE GEAR DRIVE EAST SYRACUSE, NY 13507, NOKIA OF AMERICA CORPORATION, 600 MOUNTAIN AVENUE MURRAY HILL, NJ 07974, NORTH MIDLER PROPERTIES LLC, 6041 SEWICKLEY DRIVE JAMESVILLE, NY 13078, NORTHEAST MANAGEMENT SERVICES, INC., C/O FLORINE BASILE, JR., PRESIDENT P.O. BOX 1238 CICERO, NY 13039, NORTHERN INDUSTRIAL HOLDINGS, LLC, 1675 SOUTH STATE STREET SUITE B DOVER, DE 19901, THOMPSON LAWN, LLC, 7050 CEDARBAY ROAD FAYETTEVILLE, NY 13066, THOMPSON NW, LLC, 7050 CEDARBAY ROAD FAYETTEVILLE, NY 13066, CENTER CIRCLES LLC, CHRYSLER GROUP LLC, ALERIS PARTNERS LLC, COOPER CROUSE-HINDS, LLC, PRESTOLITE ELECTRIC INCORPORATED, AKA NEW PRESTOLITE, FKA PEI 1991 ACQUISITION, INC., FULTON IRON & STEEL CO. INC., DEERE & COMPANY, OLD CARCO LIQUIDATION TRUST, BY ITS TRUSTEE RJM I, LLC 251 LITTLE FALLS DRIVE WILMINGTON, DE 19808, OLD CARCO LLC, 555 CHRYSLER DRIVE AUBURN HILLS, MI 48236, FKA CHRYSLER LLC, UNITED STATES HOFFMAN MACHINERY CORPORATION, 105 FOURTH AVENUE NEW YORK, NY 10003,

Defendants–Appellees,

LIBBEY GLASS INC., BURKO CORPORATION, EMPIRE PIPELINE CORPORATION, OLD ELECTRIC, INC., FKA OLD PRESTOLITE, FKA PRESTOLITE ELECTRIC INCORPORATED, NEW PROCESS GEAR CORPORATION, SYRACUSE CHINA COMPANY, JOHN DOES,

Defendants.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Revitalizing Auto Communities Environmental Response Trust does not have a parent corporation, and no publicly-held corporation owns ten percent (10%) or more of its stock. It is the sole member (owner) of Plaintiff-Appellant RACER Properties LLC. EPLET, LLC, not individually but solely in its representative capacity as Administrative Trustee of Revitalizing Auto Communities Response Trust does not have a parent corporation, and no publicly-held corporation owns ten percent (10%) or more of its stock.

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STATEMENT OF JURISDICTION AND JUSTICIABILITY

The complaint in this matter asserts federal claims based on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9675, and the Declaratory Judgment Act, 28 U.S.C.A. § 2201, as well as statutory and common law claims based on New York law. Federal jurisdiction is based on 28 U.S.C.A. § 1331 as to the CERCLA claims (First, Second, and Tenth Counts); on 28 U.S.C.A. § 2201 as to the declaratory judgment claim (Ninth Count); and on 28 U.S.C.A. § 1367(a) for supplemental jurisdiction as to the state law claims (Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counts).

The appeal is from the Judgment of the District Court dated and entered July 8, 2022, on the Memorandum Decision and Order of Hon. David N. Hurd, U.S.D.J., also dated and entered July 8, 2022, in which the court dismissed each of the causes of action on Defendant-Appellees' motion. Special Appendix ("SA")-1-48. The court dismissed the federal causes of action with prejudice for failure to state a claim and on statute of limitations grounds and dismissed without prejudice the state law claims after declining to exercise supplemental jurisdiction over them. SA-43, 47-48. The dismissal of all causes of action constitutes a final judgment over which this Court has appellate jurisdiction. *See* 28 U.S.C.A. § 1291; Fed. R. Civ. P. 58; *Ashmore v. CGI Group, Inc.*, 860 F.3d 80, 86 (2d Cir. 2017) (defining a

final judgment as one that "dispos[es] of all the claims of all the parties" (quotations omitted)); *cf.* Fed. R. Civ. P. 54(b). The appeal is timely because the judgment was entered on July 8, 2022, and the notice of appeal was filed on July 19, 2022, within the 30-day appeal period. SA-48; *see* Fed. R. App. P. 4(1)(A); Appellate Appendix ("A")-13-14.

STATEMENT OF THE ISSUES

1. Did the District Court erroneously evaluate the motion to dismiss by considering evidence outside the pleadings without converting the motion to one for summary judgment?
2. Applying the correct dismissal standards, does the complaint set out a timely and plausible claim for relief for each cause of action alleged?
3. If the complaint is reinstated, in whole or in part, should the matter be reassigned on remand?

STATEMENT OF THE CASE

EPLET, LLC, not individually but solely in its representative capacity as Administrative Trustee for Revitalizing Auto Communities Response Trust (RACER Trust), and RACER Properties LLC (collectively, RACER) have instituted this appeal to challenge—for the second time—the District Court's dismissal of RACER's complaint against General Electric Company and more than 40 other Defendant-Appellees (collectively, GE) relating to a portion of the

Onondaga Lake Superfund Site (the Site) in Syracuse, New York. In its complaint, RACER seeks costs and contribution to help pay for the investigation and remediation of contamination in the Ley Creek watershed within the Site related to polychlorinated biphenyls (PCBs) and other compounds pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C.A. §§ 9607, 9613; declaratory and injunctive relief as to future such costs pursuant to 28 U.S.C.A. § 2201(a) and 42 U.S.C.A. § 9613(g)(2)(B); and investigation and cleanup costs, contribution, and damages based on state law claims with a common nucleus of facts. A-90-99.

In its first appeal to this Court, RACER successfully challenged the court's (*Hurd, J.*) dismissal of its complaint on prudential ripeness grounds. *RACER Tr. v. Nat'l Grid USA*, 10 F.4th 87, 93 (2d Cir. 2021); Doc. 321, 323; *see RACER Tr. v. Nat'l Grid USA*, No. 5:18-CV-1267, 2020 WL 2404770, at *14 (N.D.N.Y. May 12, 2020); Doc. 312, 313. Following reversal and remand from this Court, the court (*Hurd, J.*) again dismissed RACER's complaint, this time for failure to state a claim and on statute of limitations grounds. *RACER Props. LLC v. Nat'l Grid USA*, No. 5:18-CV-1267, 2022 WL 2577627, at * 17 (N.D.N.Y. July 8, 2022); SA-1-48.

RACER's initial complaint was filed on October 26, 2018, and amended on April 30, 2019. A-2, 3; Doc. No. 1, 157. After RACER's first successful appeal to this Court, RACER filed its Second Amended Complaint on November 17, 2021,

refining allegations and adding an additional CERCLA claim.[1] A-15-100. On February 16, 2022, GE moved to dismiss the CERCLA § 107 claim as barred by a 2011 Consent Decree and Settlement Agreement; the CERCLA § 113 claim as untimely; and the state claims as inappropriate for the court's exercise of supplemental jurisdiction, untimely, and/or precluded by state law. A-731-37; Doc. 346-5, 363. RACER opposed the motion. Doc. 357. The court issued a Decision and Order and entered a Judgment on July 8, 2022, without oral argument, dismissing RACER's federal claims with prejudice and its state claims without prejudice. SA-7, 15 n.3, 47-48; *see* Doc. 358. This appeal followed. A-951-52.

STATEMENT OF FACTS

The complaint—liberally construed, with all factual allegations accepted as true and all reasonable inferences in RACER's favor—establishes the following facts. The General Motors-Inland Fisher Guide (GM-IFG) Subsite of the Onondaga Lake Superfund Site lies within the Ley Creek watershed. A-26-27 at ¶¶ 62-63. The GM-IFG Subsite is so named because it includes the property at which General Motors Corporation (GM) once operated the Syracuse Inland Fisher Guide plant (the Plant). A-76 at ¶ 392. The Plant was designated Operable Unit 1 (OU-1) of the GM-IFG Subsite. A-27 at ¶ 67. A stretch of Ley Creek and limited

[1] All further references to "the complaint" regard the Second Amended Complaint.

areas touching the creek were designated Operable Unit 2 (OU-2). A-28 at ¶ 69. An additional area, which RACER has termed the "Expanded Territory" comprises several upland regions in the vicinity of Ley Creek. A-28 at ¶ 70. OU-1, OU-2, and the Expanded Territory do not overlap. A-27-28 at ¶¶ 66-67, 71.

RACER alleges GE is liable pursuant to federal and state law for releasing or discharging, or arranging for the disposal of, hazardous substances and other contaminants present in OU-2 and the Expanded Territory. A-30-31 at ¶¶ 80-81; A-76 at ¶ 391.

A. The 2011 Agreement and Creation of RACER

GM filed for bankruptcy in 2009. A-81 at ¶ 414. In 2011, GM and some of its corporate successors (collectively, Debtors) executed a settlement agreement (2011 Agreement)—entered as a consent decree by the bankruptcy court—with the U.S. Environmental Protection Agency (EPA), the New York State Department of Environmental Conservation (NYSDEC), other State regulatory agencies, and the St. Regis Mohawk Tribe (collectively, Governments), and with EPLET, LLC (EPLET). A-81 at ¶ 416; A-415-514. The 2011 Agreement incorporated a Trust Agreement, which established what was later named the RACER Trust, with EPLET as Administrative Trustee. A-415-514; A-515-598. Neither EPLET nor RACER are Debtors and neither assumed Debtors' environmental liabilities. A-471-72 at ¶ 87.

Pursuant to the 2011 Agreement, RACER was tasked with taking title to certain properties of Debtors, performing environmental response activities thereon, and selling them for productive use. A-431-433 at ¶¶ 29-30. In exchange, the Governments covenanted "not to sue or assert any administrative or other civil claims or causes of action" against Debtors and RACER for environmental liabilities, and RACER obtained contribution protection for matters addressed in the 2011 Agreement. A-475-76 at ¶ 94; A-483-84 at ¶ 105.

The 2011 Agreement set forth locations subject to RACER's oversight, which included the situs of the Plant/OU-1. A-430 at ¶ 20; A-586-88.[2] The 2011 Agreement set aside money for RACER's remedial work on OU-1 and on certain areas of Ley Creek to which EPA and NYSDEC believed contaminants from OU-1 had migrated. A-83-84 at ¶¶ 424, 427. The 2011 Agreement neither defined nor referenced OU-2 or the Expanded Territory. A-82-83 at ¶ 423.

Relevant to this litigation, the 2011 Agreement resolved liability for response costs for OU-1 and for other areas but only to the extent that they were contaminated via "migration of Hazardous Substances emanating from" OU-1. A-81-87 at ¶¶ 414-439; A-431-432 at ¶ 29 (limiting RACER's purpose to performing environmental actions at the Properties and areas to which contaminants emanating

[2] The Trust Agreement and exhibits are part of the integrated 2011 Agreement. *See* A-415-514 (incorporating by reference A-515-598). The Trust Agreement sets out the metes-and-bounds description of the GM-IFG Syracuse Property. A-586-88.

from the Properties migrated); A-475-476 at ¶ 94 (recognizing that the 2011 Agreement addressed the Properties and areas affected by migration of hazardous substances emanating therefrom); A-480 at ¶ 100(vii); A-483-84 at ¶ 105 (same, and limiting "matters addressed" to costs related to "the Properties, including releases of Hazardous Substances from any portion of the Properties, and all areas affected by migration of such substances emanating from the Properties").

Thus, the parties to the 2011 Agreement expressly declined to resolve environmental response obligations for non-Plant/non-OU-1 property contaminated by any means other than the migration of hazardous substances therefrom. *See infra* Part II.A.1.b.

B. The 2015 and 2021 Agreements

In 2015, EPA and NYSDEC issued a record of decision (ROD) defining the scope of work and selecting a remedy for OU-2. A-85 at ¶ 430. Later that year, RACER and NYSDEC executed an administrative consent order pursuant to which RACER would perform remedial design and remedial action within OU-2 (2015 Agreement). A-85 at ¶ 431.

In 2021, RACER and EPA executed another administrative consent order pursuant to which RACER is obligated to conduct remedial design activities in OU-2 and a further tract of property deemed the Expanded Territory (2021

Agreement). A-87 at ¶¶ 439-40. The 2021 Agreement does not resolve RACER's liability as to the Expanded Territory. A-87 at ¶ 440.

RACER entered all three settlements without the admission of liability or any adjudication on any issue of fact or law, including the issues of whether and where contaminants traveled to via migration emanating from OU-1. A-81-82 at ¶ 417; A-85 at ¶ 432; A-110 at ¶ 9; A-426; A-655 at ¶ 5.

C. RACER's Response Costs

When it filed the Second Amended Complaint, RACER had spent more than $13.8 million responding to contamination in areas designated as OU-2 and the Expanded Territory. A-18 at ¶ 8; A-91 at ¶ 464; A-654 at ¶ 2; *see* 42 U.S.C.A. § 9607(a)(4)(B). To the extent contaminants are present in the Expanded Territory and parts of OU-2, RACER that alleges those contaminants did not migrate from the former GM Property, A-17 at ¶ 5, but rather were either placed there by "Arranger Defendants" via the realignment and widening of Ley Creek, A-73-76 at ¶¶ 374-91, or arrived there from the properties of "Owner and Operator Defendants," A-29-73 at ¶¶ 75-373. The remediation of OU-2 and the Expanded Territory will likely cost as much as $93.5 million. A-89 at ¶ 450.

Because RACER has incurred and will continue to incur costs to remediate contaminants that are neither in OU-1 nor the result of migration of hazardous

substances emanating from OU-1, they are beyond the scope of the costs covered by the 2011 Agreement.

STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of the complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and as untimely according to the applicable statute of limitations, meaning that the District Court's decision is entitled to no deference. *RACER Tr.*, 10 F.4th at 102-03; *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 319 (2d Cir. 2021). A dismissal should be affirmed "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Faulkner v. Beer*, 463 F.3d 130, 133 (2d Cir. 2006) (quotations omitted).

SUMMARY OF THE ARGUMENT

A motion to dismiss tests no more than the legal sufficiency of the complaint. *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 113 (2d Cir. 2010). Given the limited scope of analysis at this procedural posture, there are only five categories of information that the court may consider in evaluating a motion to dismiss: the pleadings, documents attached to the pleadings, documents incorporated by reference into the pleadings, documents integral to the pleadings, and matters of which the court may take judicial notice. *Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 306 (2d Cir. 2021). Pursuant to Fed. R. Civ. P.

12(d), when a motion to dismiss includes an evidentiary submission outside one of those categories, the court must either exclude that extraneous evidence or convert the matter to one for summary judgment, affording the plaintiff notice, an opportunity for discovery, and a means to rebut the extraneous evidence. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

Presented with four such pieces of extraneous evidence with GE's motion, however, the court neither excluded that evidence nor converted the matter to one for summary judgment. Although the court incorporated two of those documents by reference, it did so erroneously, and, moreover, the court did not consider whether the other two documents could be considered at the dismissal stage. The court's receipt of and failure to exclude all of GE's submitted evidence violates Rule 12(d), and the decision must be reversed on this basis alone.

RACER otherwise met its burden to defeat dismissal in that the complaint sets out sufficient factual allegations to support every element for each of RACER's causes of action. The court's conclusion that RACER's CERCLA claims are precluded by the 2011, 2015, and 2021 Agreements misconstrues all three agreements, in violation of both dismissal standards and contract interpretation principles. *See Bayerische Landesbank, N.Y. Branch v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 56 (2d Cir. 2012).

Finally, in the interests of judicial economy, to allow progress in this matter, and to avoid any appearance of impropriety, RACER seeks reassignment upon the reinstatement of any portion of its complaint. In the four years since this litigation began, it has yet to proceed beyond the dismissal stage, having been twice dismissed and, now, twice appealed to this Court. In the most recent dismissal, in addition to a host of disparaging comments regarding RACER's earnest legal arguments, the court maligned EPA and RACER with the baseless suggestion that they somehow conspired to obscure the futility of RACER's claims. Reassignment is thus warranted.

ARGUMENT

I. The District Court Erred by Failing to Convert GE's Motion to Dismiss to a Motion for Summary Judgment.

As the party seeking dismissal, it was GE's burden to establish that RACER's complaint failed to state a claim as a matter of law. *See Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003), *abrogated on other grounds recognized by Am. Psych. Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016). To survive a motion to dismiss, a complaint need only "contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 854 (2d Cir. 2021) (quotations omitted). In considering the motion, the court was required to "construe[] the complaint liberally, accepting all factual allegations in the

complaint as true, and drawing all reasonable inference in the plaintiff's favor." *Vaughn v. Phoenix House N.Y. Inc.*, 957 F.3d 141, 145 (2d Cir. 2020).

When construing a complaint at the dismissal stage, courts may consider only the pleadings and documents that qualify as part of the pleadings, which are limited to "(1) the complaint or answer, (2) documents attached to the pleading, (3) documents incorporated by reference in or integral to the pleading, and (4) matters of which the court may take judicial notice." *Lively*, 6 F.4th at 306; *see* Fed. R. Civ. P. 10(c); *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 214 (2d Cir. 2020).

Procedurally, the consideration of evidence beyond these categories converts a motion to dismiss to one for summary judgment. *See* Fed. R. Civ. P. 12(d); *Chambers*, 282 F.3d at 152. "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56," and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

As this Court explained in *Chambers*, "the harm to the plaintiff when a court considers material extraneous to the complaint is the lack of notice that the material may be considered." 282 F.3d at 153. Thus, lack of notice to the plaintiff is dispositive:

> It seems fair to include within the term 'reasonable opportunity' some indication by the court to 'all parties' that it is treating the 12(b)(6)

> motion as a motion for summary judgment. Here, the district judge gave no indication that he was going to consider anything but the pleadings, plaintiff filed no counter-affidavit, and the factual issue of whether she received notice was resolved against her on defendants' affidavits alone. This was error.

Dale v. Hahn, 440 F.2d 633, 638 (2d Cir. 1971) (citations and footnote omitted)). Along with notice, the court must provide the plaintiff "an opportunity to conduct appropriate discovery and submit the additional supporting material contemplated by Rule 56." *Chambers*, 282 F.3d at 154; *accord Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006) ("[The conversion requirement] deters trial courts from engaging in factfinding when ruling on a motion to dismiss and ensures that when a trial judge considers evidence dehors the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it."); *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106 (2d Cir. 2021); *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000); *Morelli v. Cedel*, 141 F.3d 39, 45-46 (2d Cir. 1998). This is so unless the plaintiff has so relied on the "terms and effect of a document in drafting the complaint" that no such notice is implicated. *Chambers*, 282 F.3d at 153.

If the court elects not to exclude the extraneous evidence from consideration, this conversion requirement and its attendant procedure is mandatory. *See, e.g.*, *Glob. Network Commc'ns*, 458 F.3d at 155 ("As indicated by the word 'shall,' the

conversion of a Rule 12(b)(6) motion into one for summary judgment under Rule 56 when the court considers matters outside the pleadings is strictly enforced and mandatory." (alterations and quotations omitted)); *Chambers*, 282 F.3d at 154 (explaining the court is "obligated to convert the motion to one for summary judgment"); *Palin v. N.Y. Times Co.*, 940 F.3d 804, 811 (2d Cir. 2019) (concluding that the trial court "took neither permissible route under Rule 12(d)" by "rel[ying] on matters outside the pleadings to decide the motion to dismiss [and] not convert[ing] the motion into one for summary judgment."); *see also In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 781 (9th Cir. 2014) (describing the court's sua sponte obligation pursuant to Rule 12(d)); *Hurd v. Dist. of Columbia*, 864 F.3d 671, 687 (D.C. Cir. 2017) ("[A]s Rule 12(d)'s use of the obligatory 'must' makes plain, a court that decides to consider extra-pleading material is required to convert the motion to dismiss into one for summary judgment, with attendant procedural protections."); *CODA Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1360 (Fed. Cir. 2019) (characterizing the court's failure to effectuate a conversion as a "procedural error").

To its motion to dismiss, filed pursuant to Rule 12(b)(6), GE attached four additional pieces of evidence totaling more than 150 pages: the Affirmation of Kristin Carter Rowe in Support of Defendant's Motion to Dismiss, A-738-40, and three exhibits attached to the Rowe affirmation—a proof of claim, cover sheets for

two additional proofs of claim, and a complaint in an unrelated Michigan case. A-741-902. Notwithstanding RACER's argument that the court could not consider GE's extraneous evidence, Doc. 357 at 22-23, the court excluded none of the evidence; provided no notice that it was allowing the evidence; provided RACER no opportunity for discovery or additional evidentiary submissions; and then relied heavily on that evidence—particularly the proof of claim materials—to grant GE's motion, SA-10, 11 n.2, 25-38. Because none of the extraneous evidence is of a type the court could consider on GE's motion to dismiss, the court violated Rule 12(d) by failing to exclude the evidence or convert the matter to a summary judgment, and reversal is warranted on this basis.

A. The Complaint

Most obviously, the extraneous evidence submitted by GE was not within the complaint. *See* A-15-100.

B. Attachments to the Complaint

RACER also did not attach to its complaint the Rowe affirmation, the proofs of claim, or the Michigan complaint. *See* A-15-730.

C. Documents Incorporated by Reference into the Complaint

RACER's complaint does not mention or rely on—much less purport to incorporate by reference—the Rowe affirmation, the proofs of claim, or the Michigan complaint, the Rowe affirmation post-dates the complaint. *See* A-15-

100; *Incorporation by Reference*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Williams v. PMA Cos., Inc.*, 419 F. Supp. 3d 471, 483 (N.D.N.Y. 2019) (concluding documents that post-date a pleading cannot be deemed incorporated therein by reference).

As discussed in greater detail below, much of this dispute regards the proper interpretation of the scope of the 2011 Agreement. *See infra* Part II.A.1.b-d. RACER does not dispute that, in ruling on GE's motion, the court was permitted to (and did) consider the 2011 Agreement, which was attached to the complaint. *See* A-415-514. Beyond that, however, the court determined that the proof of claim materials submitted by GE (GE Exhibits A and B) were incorporated by reference into the 2011 Agreement—and thus the Rule 12(b)(6) analysis. *See* SA-8 n.1, 11 n.2, 27 n.6. The court reasoned that Exhibits A and B "plainly [met] the requirements of incorporation by reference" into the 2011 Agreement because (1) the 2011 Agreement mentioned the document numbers assigned to the proofs of claim in the underlying bankruptcy and (2) "EPLET signed the 2011 Agreement, plaintiffs as a whole can be ascribed both knowledge of and assent to the terms of the Proofs of Claim."[3] SA-27. This was error.

[3] Curiously, the court agreed that "the Proofs of Claim are not explicitly part of the 2011 Agreement" but went on to conclude that they were "expressly identified" and incorporated in "clear and unambiguous terms." SA-25-27.

Generally, "a paper referred to in a written instrument and sufficiently described may be made a part of the instrument as if incorporated into the body of it." *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996) (quotations omitted). However, "to uphold the validity of the terms incorporated by reference it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms." *Id.* (quotations omitted); *see Williams*, 419 F. Supp. 3d at 483 ("To be incorporated by reference, the complaint must make a clear, definite and substantial reference to the documents." (quotations omitted)). Moreover, "the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be *identified beyond all reasonable doubt*." *PaineWebber*, 81 F.3d at 1201 (quotations omitted). Exhibits A and B do not meet these criteria.

1. Exhibit B is Unreliable for Incompleteness

The Rowe affirmation represents that Exhibit A is "Proof of Claim No. 64064, dated November 28, 2009," filed by the United States in Debtors' bankruptcy. A-739 at ¶ 2. The attached document marked Exhibit A comprises a cover page and over 100 pages of allegations by the United States. A-741-850. The Rowe affirmation represents that Exhibit B consists of "the amended and supplemental cover sheets for Proof of Claim No. 50587, dated February 28 and 29, 2011," which were filed by NYSDEC in Debtors' bankruptcy. A-739 at ¶ 2.

Attached and labeled as Exhibit B are two cover sheets numbered proofs of claim 71024 and 71025, with a small notation at the bottom associating them with "POC # 50587."[4] A-852-53. Both are single-page preprinted fill-in-the blank forms; added to each was one check mark, a date and signature, two addresses, the claim number, a dollar amount, the name of the creditor, a receipt stamp, and the three-word basis for the claim. A-852-53. Beyond those few pieces of information, no additional information is provided about claims 71024 or 71025, nor is any information provided about claim 50587. Full versions of these documents appear nowhere in the record, and GE conceded that Exhibit B is incomplete. Doc. 346-5 at 3 n.4 ("Defendants have not yet located a copy of the full proof of claim package."). That incompleteness diminishes the reliability, and therefore the utility, of Exhibit B.

2. Exhibits A and B Are Not Identified Beyond All Reasonable Doubt.

The claims identified in Exhibit B—71024 and 71025—also have no tie whatsoever to the complaint or the 2011 Agreement, neither of which refers to or identifies either proof of claim 71024 or 71025 (although the court inexplicably stated that "the 2011 Agreement expressly identified them by their document numbers," SA-27), falling far short of the "beyond all reasonable doubt standard."

[4] The cover sheets for claims 71024 and 71025 themselves contain facial errors. For example, they both incorrectly identify GM-IFG as "Island Fisher Guide" rather than "Inland Fisher Guide." A-852-53.

A.15-100, 424-25; *see PaineWebber*, 81 F.3d at 1201. To the extent the court instead relied on the incorporation of underlying claim 50587, the court made no mention of claim 50587. Claim 50587 itself appears nowhere in the record. SA-10, 27 n.6. Moreover, GE's submission of some proof of claim evidence (complete or incomplete) could not open the door to the court's consideration of other documents filed in the underlying bankruptcy proceeding, including claim 50587. *See Goel v. Bunge, Ltd.*, 820 F.3d 554, 560 (2d Cir. 2016) ("A complaint that alleges facts related to or gathered during a separate litigation does not open the door to consideration, on a motion to dismiss, of any and all documents filed in connection with that litigation. A contrary rule would permit the improper transformation of the Rule 12(b)(6) inquiry into a summary-judgment proceeding—one featuring a bespoke factual record, tailor-made to suit the needs of defendants." (citations omitted)). Thus, the court improperly incorporated by reference two incomplete documents that the pleadings do not mention, that GE never provided, and that GE could not even locate.

Nor did the 2011 Agreement identify proof of claim 64064—GE Exhibit A—sufficient for incorporation by reference. The 2011 Agreement identified this claim among many others in the context of providing a complete summary of relevant procedural history and identifying the causes of action no longer viable by the date of the agreement's execution. *See* A-424-25. No proofs of claim were

attached to the 2011 Agreement, and nowhere did the 2011 Agreement purport to incorporate any proof of claim by reference. The mere mention of those documents in the 2011 Agreement is not sufficient to allow their incorporation by reference. *See Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989) (explaining that quoting a document is not enough to incorporate it by reference); *Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985) (same).

3. RACER Did Not Assent to the Terms of Exhibits A and B.

Finally, by executing the 2011 Agreement, RACER did not "assent to the terms of the Proofs of Claim." SA-27. Indeed, it is not even clear what the court supposed RACER assented to—whether it deemed RACER to have assented to the existence of the proofs of claim, to the truth of allegations contained therein, or to the incorporation by reference of the proofs of claim into the 2011 Agreement. There is nothing about the mention of the proofs of claim in the 2011 Agreement that suggests that RACER assented to their incorporation by reference, however. *See PaineWebber*, 81 F.3d at 1201. Even if it had, the court improperly treated the proofs of claim as if RACER admitted to all the allegations within them. This conclusion misconceives the nature and role of proofs of claim and, moreover, evinces the court's impermissible foray into the weight and credibility of that evidence.

Proofs of claim operate much like the complaint in any civil action, asserting a creditor's right to receive a distribution from the bankruptcy estate and putting the court and others on notice of that alleged right. *See* Fed. R. Bankr. P. 3001; *In re Cruisephone, Inc.*, 278 B.R. 325, 330 (Bankr. E.D.N.Y. 2002) ("[A] proof of claim filed by a creditor is conceptually analogous to a civil complaint . . . ."); *In re Brosio*, 505 B.R. 903, 912 (B.A.P. 9th Cir. 2014) (same). Because GE Exhibits A and B are merely disputed pleadings (or parts thereof) in a bankruptcy proceeding, they are easily distinguished from the types of documents that are ordinarily deemed to be incorporated by reference in contracts. *See, e.g.*, *PaineWebber Inc.*, 812 F.3d at 1201 (determining that portions of a prior agreement had been imported as terms into a newer contract); *Pagaduan v. Carnival Corp.*, 709 F. App'x 713, 715 (2d Cir. 2017) (discussing the incorporation of "industry terms and conditions").

Moreover, like civil complaints, proofs of claim may be disputed, *see* 11 U.S.C.A. § 101; withdrawn, *see* Fed. R. Bankr. P. 3006; or settled. Thus, like any settlement, settling a proof of claim does not mean that a bankruptcy debtor admits to any of the allegations in the bankruptcy claim or any related liability. *See Greenspun v. Bogan*, 492 F.2d 375, 381 (1st Cir. 1974) (noting that settlement requires a compromise of the parties' "assertions of law and fact").

Such is the case here. The proofs of claim were the Governments' initial broad requests for relief and, by the 2011 Agreement, the parties settled those claims without any determination of their merits. A-426 (stating the 2011 Agreement was executed "without the admission of liability or any adjudication on any issue of fact or law"). Thus, the court used the proofs of claim as if RACER had admitted to their contents, rather than treating them as they are—unproved allegations, to which RACER never admitted, about which no court ever made findings, as to which the parties reached a settlement instead of a finding of liability.

That the proofs of claim have limited utility is particularly true at the dismissal stage, when the court is both required to view the allegations in the complaint as true and precluded from weighing any evidence or deciding between competing versions of the truth. *See Lively*, 6 F.4th at 306 ("But a court may not resolve the motion by weighing the plausibility of competing allegations or by considering evidence extrinsic to the non-movant's pleading without converting the motion to one for summary judgment."); *Vaughn*, 957 F.3d at 145. Here, in contrast, the court used incomplete proof of claim evidence without providing any notice to RACER of its intent to do so and without giving RACER any opportunity to rebut it; deemed RACER to have admitted to the allegations in the proofs of claim, notwithstanding the execution of a settlement in lieu of any findings on

those claims; and effectively afforded greater weight to the unproved claims than to the language of the pleadings. For these reasons, EPLET's execution of the 2011 Agreement on behalf of RACER cannot be regarded as RACER's "assent to the terms of the Proofs of Claim" by any definition. Thus, neither of the grounds on which the court relied to conclude that the proofs of claim were incorporated by reference is accurate, and they do not constitute a sufficient basis for the court's conclusion.

The suggestion that the proofs of claim were incorporated by reference into the 2011 Agreement is further belied by the fact that the 2011 Agreement *did incorporate* other documents. A-420, 509-14. Unlike the proofs of claim, the 2011 Agreement identifies and attaches each incorporated document, states the purpose for which each is incorporated within the 2011 Agreement, and relies on the truth of the information contained in each. A-420, 422; A-429-31 at ¶¶ 15, 20, 24; A-435-36 at ¶ 32; A-437-38 at ¶ 36(a); A-442 at ¶ 42; A-476 at ¶ 96; A-509-15 at Att. A-D. If the parties to the 2011 Agreement had intended to incorporate by reference the proofs of claim, they undoubtedly would have done so in the same manner.[5] More importantly, the fact that this analysis raises *any* such discussion of

[5] The 2011 Agreement was a carefully constructed settlement reached—in conjunction with the underlying trust agreement—after detailed negotiations among the parties with the Bankruptcy Court's oversight, and it was a process to which none of the defendants in this matter was privy. To the extent that the 2011 Agreement is ambiguous, RACER has its own evidence to offer regarding the parties' intent in executing the 2011 Agreement, if that evidence is called for and at the proper procedural posture.

the parties' factual intent in executing the 2011 Agreement is ample demonstration of the error in dismissing this case. To the extent that a contract is ambiguous such that extrinsic evidence of the parties' intent must be considered to interpret the contract, a dismissal as a matter of law is precluded. *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.*, 375 F.3d 168, 178 (2d Cir. 2004) ("[A] claim predicated on a materially ambiguous contract term is not dismissible on the pleadings."); *infra* Part II.A.1.b, d.

This Court should therefore conclude that the court erred by incorporating the proofs of claim by reference into the 2011 Agreement. Because the proofs of claim formed a primary point of the court's analysis of the motion to dismiss—the court cited to them thirteen times in the judgment, SA-10-13, 27 n.6, 28, 31—the court's erroneous incorporation of the proofs of claim in the 2011 Agreement is not harmless error. *See* Fed. R. Civ. P. 61.

Even if the proofs of claim were incorporated by reference into the 2011 Agreement and thereby became part of the pleadings, the court still erred. GE also attached the Rowe affirmation and the Michigan complaint (GE Exhibit C), which the court did not exclude or find to be part of the pleadings. It does not matter that the court did not discuss the Rowe affirmation or the Exhibit C in the decision; the court's failure to exclude them alone, whether or not the court discussed them in the decision, is a sufficient basis to conclude that the court erred by failing to

convert the matter to summary judgment. *See SM Kids*, 963 F.3d at 214 ("[I]f the district court received and elected not to exclude matters outside the pleadings, Rule 12(d) presented it with only two options: exclude the additional material or convert the motion to one for summary judgment.").

D. Documents Integral to the Complaint

For similar reasons, the extraneous evidence submitted by GE does not meet the related, narrow exception to the Rule 12(d) conversion requirement for documents integral to the complaint:

> A document is integral to the complaint where the complaint relies heavily upon its terms and effect. Merely mentioning a document in the complaint will not satisfy this standard; indeed, even offering limited quotations from the document is not enough. In most instances where this exception is recognized, the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document . . . would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint.

Goel, 820 F.3d at 559 (citations and quotations omitted); *see Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) ("In addition, even if not attached or incorporated by reference, a document upon which the complaint *solely* relies and which is *integral* to the complaint may be considered by the court in ruling on such a motion." (alteration and quotations omitted); *Williams*, 419 F. Supp. 3d at 483 ("To be integral to a complaint, the plaintiff must have (1) actual notice of the extraneous information and (2) relied upon the documents in framing the complaint."

(alteration and quotations omitted)). A document may not be deemed integral to the complaint if it is the subject of any dispute regarding its "authenticity or accuracy." *DiFolco*, 622 F.3d at 111.

None of the documents supplied by GE was integral to RACER's complaint. The complaint does not cite to or otherwise rely on any of the extraneous evidence, the complaint does not stand or fall on their contents or interpretation, and the Rowe affirmation could not have been integral to the complaint because it post-dates it. *See Williams*, 419 F. Supp. 3d at 483. That EPLET signed the 2011 Agreement on RACER's behalf is also no basis to determine the extraneous evidence was integral to the complaint, particularly given that four of GE's extraneous documents (the Rowe affirmation, claim 71024, claim 71025, and the Michigan complaint) also post-date EPLET's October 2010 execution of the 2011 Agreement. A-491; *see Roth*, 489 F.3d at 509; *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001) (explaining the plaintiff must have actual notice of all the information in the movant's papers *and* the documents must be integral to plaintiff's complaint). Furthermore, even if deemed integral to the complaint, extraneous evidence may not be used for the truth of the matter asserted, which is precisely how the court used the proofs of claim here. *See Fine v. ESPN, Inc.*, 11 F. Supp. 3d 209, 223 (N.D.N.Y. 2014); *infra* Part I.E.

E. Judicially Noticeable Documents

Pursuant to Fed. R. Evid. 201, the court may take judicial notice of an adjudicative fact "at any stage of the proceedings" if that fact "is not subject to reasonable dispute because it . . . is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The court did not purport to take judicial notice of the extraneous evidence, nor could it have.

The Rowe affirmation itself was not judicially noticeable because Rowe's avowed "personal knowledge," even as an attorney, is neither generally known nor its accuracy readily determined. A-738-40; *see* Fed. R. Evid. 201; *Henderson v. State of Oregon*, 203 F. App'x 45, 52 (9th Cir. 2006) ("Adjudicative facts appropriate for judicial notice are typically different from facts found in affidavits supporting litigation positions, which often present facts subject to dispute."); *Williams*, 419 F. Supp. 3d at 484 (noting that an "affidavit contains assertions of fact that are not generally known within the Court's jurisdiction and that cannot be accurately and readily determined from accurate sources" (alteration and quotations omitted)).

Exhibits A, B, and C consist of pleadings filed in other jurisdictions. A-741-902. As Rule 201 expressly states, however, judicial notice may not be accomplished for any evidence that is subject to a reasonable dispute. *See*

Melendez v. City of New York, 16 F.4th 992, 997 n.2 (2d Cir. 2021) ("To the extent that facts of which we might otherwise take judicial notice are disputed, we decline to consider them."); *see also Oneida Indian Nation v. New York*, 691 F.2d 1070, 1086 (2d Cir. 1982) (stating judicial notice of a disputed fact is an inappropriate basis for the dismissal of complaint on its face). Debtors would certainly dispute many of the allegations in the many proofs of claim mentioned in the 2011 Agreements; it was the settlement of those claims in the 2011 Agreement that obviated the need to dispute them.

Otherwise, public records, including court pleadings, are among the types of documents of which a court may take judicial notice—with the caveat that those pleadings are evidence only of the fact of their filing and the scope of their contents, but they may not be used to establish the truth of those contents. *Beauvoir v. Israel*, 794 F.3d 244, 248 n.4 (2d Cir. 2015); *Roth*, 489 F.3d at 509; *see Jones v. City of Cincinnati*, 521 F.3d 555, 561 (6th Cir. 2008) (explaining that treating an exhibit as part of the pleading does not require accepting the contents of the exhibit as true); *Furnari v. Warden, Allenwood Fed. Corr. Inst.*, 218 F.3d 250, 255 (3d Cir. 2000) (declining to take judicial notice of the truth of the statements contained in an affidavit); *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995).

Contrary to this limitation, the court used the extraneous evidence not for the fact of the filings or the fact of their contents but instead expressly relied on the proofs of claim for the truth of the allegations asserted therein—specifically, to establish the geographic descriptions of the property at issue, SA-11, 28, 33-36; to establish the presence of certain contaminants at certain locations, SA-12 ("According to the Proofs of Claim, PCBs are present at each of those three subsites because of GM, and specifically the IFG Plant."); to "establish the bounds of the Governments' covenants not to sue," SA-27; and, most egregiously, to "establish[] that GM was responsible for contaminating OU-1," SA-28, and, indirectly, OU-2, SA-28.

F. Conclusion

GE submitted evidence with its Rule 12(b)(6) motion to dismiss RACER's complaint that was neither a pleading nor attached to a pleading, was not judicially noticeable, and was not integral to the complaint, nor did the court consider the extraneous evidence to be attached, integral, or judicially noticeable. The court instead deemed *only a portion* of the extraneous evidence—the proofs of claim in GE Exhibits A and B—to have been incorporated by reference into the pleadings. This conclusion was erroneous because the incorporated evidence was partially unreliable as incomplete, was not identified beyond all reasonable doubt, consisted

merely of unproved allegations in a separate matter, and because RACER did not assent to the incorporation of that evidence as a term of the 2011 Agreement.

The court did not exclude *any* of the extraneous evidence from the motion to dismiss. Nor did the court provide notice to RACER of its intent to consider the evidence, convert the matter to one for summary judgment, or allow RACER to conduct discovery to oppose and rebut GE's premature offer of evidence. This, Rule 12(d) does not allow.

Because there exists *any* extraneous evidence that was neither deemed part of the pleadings nor excluded, the District Court's failure to convert the motion to one for a summary judgment requires vacatur of the judgment dismissing RACER's complaint and that the matter be remanded for further proceedings. *See Chambers*, 282 F.3d at 154 ("This conversion requirement is 'strictly enforced' whenever a district court considers extra-pleading material in ruling on a motion to dismiss."); *Friedl*, 210 F.3d at 84 ("Vacatur is required even when the district court's ruling merely makes a connection not established by the complaint alone or contains an unexplained reference that raises the possibility that it improperly relied on matters outside the pleading . . . ." (alterations and quotations omitted)); *Leonard F. v. Israel Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999).

II. RACER'S Complaint Asserts Viable Federal and State Claims.

RACER's complaint need only contain sufficient facts that, deemed true, set out a plausible basis for finding each element of each cause of action. *See Kaplan*, 999 F.3d at 854. "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendants on notice of the essential elements of the plaintiffs' cause of action." *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). In this endeavor, the complaint must be liberally construed and all reasonable inferences drawn in RACER's favor. *See Vaughn*, 957 F.3d at 145. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566 (2007) (quotation omitted).

A. Federal Claims

CERCLA's purpose is twofold: "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1345 (2020). The statute adopts a strict liability regime, imposing liability for response costs on "a range of persons, including not only the property owner who might have been responsible for environmental damage, but other owners, operators, arrangers, or transporters." *Price Trucking Corp. v. Norampac Indus., Inc.*, 748 F.3d 75, 82 (2d Cir. 2014); *see* 42 U.S.C. § 9607(a)(1)-(4). All "parties

that may be held accountable for hazardous waste in particular circumstances" are known as potentially responsible parties ("PRPs"). *Atl. Richfield*, 140 S. Ct. at 1353.

"Two provisions of [CERCLA]—§§ 107(a) and 113(f)—allow private parties to recover expenses associated with cleaning up contaminated sites." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 131 (2007). Section 107 allows "any person" a cause of action to recover "any . . . necessary costs of response incurred . . . consistent with the national contingency plan," 42 U.S.C. § 9607(a), that EPA has published to effectuate the cleanup of contaminated sites, *see id.* §§ 9601(31), 9605. Claims can be pleaded "at any time after such costs have been incurred." 42 U.S.C. § 9613(g)(2). "Section 107 allows for complete cost recovery under a joint and several liability scheme; one PRP can potentially be accountable for the entire amount expended to remove or remediate hazardous materials." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 121 (2d Cir. 2010).

Section 107 allows for the recovery of past costs, but CERCLA also provides a mechanism to obtain a declaratory judgment as to future costs: "[T]he court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2).

Section 113(f) creates a cause of action for a private party to seek equitable contribution from other PRPs when that plaintiff that has not "*incurred* actual response costs" but has instead "*reimbursed* those response costs to others." *Niagara Mohawk*, 596 F.3d at 122 (emphases added). In particular, a party that "has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement," 42 U.S.C. § 9613(f)(2), but that settling party may, in turn, seek contribution for response costs addressed in the settlement "from any person who is not party to [such] a settlement," *id.* § 9613(f)(3)(B).[6] "[I]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.* § 9613(f)(1).

1. Section 107 and Declaratory Judgment Claims

Here, RACER pleaded a Section 107 claim (Count 1) and a corresponding declaratory judgment claim (Count 9), seeking to recover amounts already expended for environmental response costs and future amounts yet to be expended in connection with the Site. A-90-91 at ¶¶ 456-66; A-97 at ¶¶ 501-06.

[6] In the alternative, Section 113(f)(1) allows a PRP that has "been sued under [CERCLA] § 106 or § 107(a)" to seek contribution from other PRPs. *Niagara Mohawk*, 596 F.3d at 122; *see* 42 U.S.C. § 9613(f)(1). RACER has not been sued and does not plead a Section 113(f)(1) claim.

a. RACER Met Its Pleading Burden

The Section 107 claim required RACER to plead the following elements:

- That RACER and GE are "persons," which means "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity," or government. 42 U.S.C.A. §§ 9607(a)(2), (3), (21); *see* 40 C.F.R. § 307.14.

  RACER alleged that EPLET and RACER Properties are limited liability companies and that all defendants are or were corporations, partnerships, or limited liability companies. A-18-26 at ¶¶ 10-58.

- That the contamination at issue is from "hazardous substances" within the meaning of CERCLA, defined as, *inter alia*, "any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title." 42 U.S.C.A. §§ 9601(14), 9607(a)(2), (3); *see* 40 C.F.R. §§ 302.4(a) & Table 302.4, 307.14.

  RACER alleged that the Site has been contaminated with hazardous substances. A-29-30 at ¶¶ 75-79; A-90 at ¶ 457; A-92 at ¶ 468; A-98 at ¶ 508.

- That such hazardous substances were disposed of or released at the Site. 42 U.S.C.A. §§ 9601(22), (29), 9607(a)(2).

  RACER alleged GE released or discharged hazardous waste into the environment at the Site. A-16 at ¶ 2; A-26 at ¶ 59; A-32 at ¶ 90; A-35 at ¶ 104; A-38-39 at ¶¶ 124-25, 135; A-43 at ¶ 159; A-48-49 at ¶¶ 196, 205; A-53-56 at ¶¶ 233, 246, 258; A-58-60 at ¶¶ 275, 285; A-62-63 at ¶¶ 298, 304; A-68 at ¶ 340; A-71 at ¶ 360; A-73 at ¶ 373; A-76 at ¶ 391.

- That the disposal or release occurred "from facilities," 42 U.S.C.A. § 9607(a)(2), (3), i.e., "any building, structure, installation, equipment, . . . ditch, landfill, . . . or . . . any site or area where a hazardous substance has been deposited, stored, disposed of, or place, or otherwise comes to be located . . . .", *id.* § 9601(9). *See* 40 C.F.R. § 307.14.

  RACER alleged that hazardous substances were released from manufacturing facilities and other operations, including buildings,

equipment, and sites where hazardous substances were located. A-16 at ¶ 2; A-31-32 at ¶¶ 84, 91; A-35 at ¶ 106; A-37-40 at ¶¶ 120-21, 126, 136; A-44-50 at ¶¶ 175-79, 184, 198, 202, 206; A-52-57 at ¶¶ 226-27, 234, 237, 240, 247, 251, 259, 261-63; A-59-60 at ¶¶ 276, 278, 286-87; A-62-63 at ¶¶ 299, 305-06; A-69 at ¶ 341; A-71 at ¶ 361; A-90 at ¶ 458.

- That such disposal or release was done by current "owners" or "operators" of a facility, by those that were "owners" or "operators" at the time of the disposal or release of hazardous substances, or by those who arranged for disposal or treatment of hazardous substances. 42 U.S.C.A. § 9607(a)(2), (3); *see id.* § 9601(18), (20)(A)(ii).

  RACER alleged "owner and operator" defendants owned or operated the facilities at the time hazardous substances were released. A-31-32 at ¶¶ 82, 84, 91; A-35 at ¶¶ 105-06; A-37 at ¶¶ 117, 119-20, 122; A-40 at ¶¶ 126-27, 134, 136, 138, 140; A-43-45 at ¶¶ 160-74, 178; A-48-57 at ¶¶ 198, 206, 207-10, 213-14, 217, 220-27, 234-35, 237, 239-41, 247-49, 257, 259-61; A-59-60 at ¶¶ 276-77, 284, 286-87, 289; A-62-63 at ¶¶ 299-300, 305-06; A-65 at ¶¶ 318-24; A-69-72 at ¶¶ 341-47, 355-58, 361, 364-65; A-90 at ¶ 459. RACER also alleged "arranger" defendants and some owner and operator defendants arranged for the disposal of hazardous substances. A-25-26 at ¶¶ 55-58; A-73-76 at ¶¶ 374-91; A-90-91 at ¶ 460.

- That RACER has incurred necessary response costs, 42 U.S.C.A. § 9607(a)(4)(B), where "response" is defined as "remove, removal, remedy, and remedial action," *id.* § 9601(25); *see* 40 C.F.R. § 307.14 (defining "necessary response costs").

  RACER alleged it has incurred necessary response costs at OU-2 and the Expanded Territory as a result of the contamination. A-16-18 at ¶¶ 1, 6-8; A-88 at ¶¶ 443-45; A-91 at ¶¶ 462-63; A-599-623.

- That RACER's response costs were consistent with the National Contingency Plan. *See* 42 U.S.C.A. §§ 9601(31), 9607(a)(4)(B).

  RACER alleged that all response costs incurred were consistent with the National Contingency Plan. A-91 at ¶ 464.

See United States v. Alcan Aluminum Corp., 990 F.2d 711, 719-20 (2d Cir. 1993).

RACER's Section 107 claim is also timely. A claim for recovery of costs as to remedial action pursuant to Section 107 must be filed "within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C.A. § 9613(g)(2)(B); *see Schaefer v. Town of Victor*, 457 F.3d 188, 203-10 (2d Cir. 2006). RACER alleged that it incurred response costs within OU-2 and the Expanded Territory between the date of filing its initial complaint and September 30, 2021, and its initial complaint was filed fewer than 6 years later, on October 26, 2018. Doc. 1; A-88 at ¶¶ 443-44.

RACER's complaint adequately alleges each of these elements, consistent with its burden at dismissal. GE argued, however, and the court agreed, that the amounts for which RACER seeks recovery in Count 1 are not eligible for Section 107 cost recovery because those amounts were incurred according to the 2011 Agreement, for which only contribution could have been obtained pursuant to Section 113. Doc. 346-5 at 14-19; SA-38-39. As this Court has noted, typically, "where a plaintiff's claim fits squarely within the more specific requirements of § 113, the plaintiff cannot choose instead to proceed under § 107" (although RACER argues in the alternative that this rule does not apply because RACER had no liability to resolve by the 2011 Agreement).[7] Doc. 323 at 34.

[7] No court has yet addressed whether a party in RACER's unusual "procedural circumstance[]," *Atl. Rsch.*, 551 U.S. at 139 (quotation omitted)—as trustee of a private, environmental response trust established and funded by a federal consent decree to respond to

Such a determination requires an interpretation of the scope of the 2011 Agreement, namely, whether the 2011 Agreement required RACER to pay the cost recovery amounts it now seeks, making the claim eligible only for Section 113 relief, or whether the costs RACER seeks are distinguishable from those covered by the 2011 Agreement, making the claim eligible for Section 107 recovery.

b. The 2011 Agreement Unambiguously Does Not Apply to RACER's Recovery Costs

Because consent decrees are "agreements between parties that should be construed basically as contracts," *EEOC v. N.Y. Times Co.*, 196 F.3d 72, 78 (2d Cir. 1999) (quotations omitted), the 2011 Agreement may be construed at the dismissal stage as a matter of law according to contract interpretation principles, *see Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 55 n.5 (2d Cir. 1985) (importing federal common law principles to interpret a contract to which the United States is a signatory); *McPheeters v. McGinn, Smith & Co., Inc.*, 953 F.2d 771, 772 (2d Cir. 1992) ("Where the dispute concerns an issue of contract, the application of federal law simply comprises generally accepted principles of contract law." (quotations omitted)).

Foremost among these is the principle that, in interpreting a contract, the court must determine the parties' intent according to the language of the contract

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contamination for which neither the trust nor its trustee is liable—may recover its response costs under Section 107 for "matters addressed" in the decree giving rise to the trust.

itself. *Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010) ("The best evidence of what parties to a written agreement intend is what they say in their writing." (alteration and quotations omitted)); *Network Pub'g Corp. v. Shapiro*, 895 F.2d 97, 99 (2d Cir. 1990) ("We must consider the words [of a contract] themselves for they are always the most important evidence of the parties' intention" (quotations omitted)).

To do so, the Court must evaluate the plain and unambiguous meaning of the 2011 Agreement "without the aid of extrinsic evidence." *Law Debenture Tr. Co.*, 595 F.3d at 467. "The parties' rights under an unambiguous contract should be fathomed from the terms expressed in the instrument itself rather than from extrinsic evidence as to terms that were not expressed or judicial views as to what terms might be preferable." *Met. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990); *accord JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396 (2d Cir. 2009). "Contract language is not ambiguous if it has a definite and precise meaning, unattended . . . by danger of misconception in the purport of the contract itself, and concerning which there is . . . no reasonable basis for a difference of opinion." *Bayerische*, 692 F.3d at 53 (quotations omitted).

If a court determines, as a matter of law, that a contract is ambiguous—that is, "where a contract term could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the

entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business"—the court may then consider, as a matter of fact, the parties' intent in executing the contract by considering evidence extrinsic to the contract. *Id.* at 53, 56. This Court reviews de novo the District Court's determination that a contract is ambiguous, as well as its interpretation of an unambiguous contract. *Law Debenture Tr. Co.*, 595 F.3d at 468. The meaning of an ambiguous contract based on extrinsic evidence presents a question of fact for a factfinder. *Mellon Bank, N.A. v. U. Bank Corp. of N.Y.*, 31 F.3d 113, 116 (2d Cir. 1994).

An ambiguous contract may not be interpreted at the dismissal stage, however, which is limited to conclusions rendered only as a matter of law. *Bayerische*, 692 F.3d at 53 ("[A] claim predicated on a materially ambiguous contract term is not dismissible on the pleadings." (quotations omitted)); *Orlander v. Staples, Inc.*, 802 F.3d 289, 295 (2d Cir. 2015) ("If a contract is ambiguous as applied to the facts that furnish the basis of the suit, a court has insufficient data to dismiss a complaint for failure to state a claim." (quotations and alterations omitted)). Rather, on a motion to dismiss, any ambiguities in the 2011 Agreement must be resolved in RACER's favor. *See Shultz v. Congreg. Shearith Israel*, 867 F.3d 298, 302 (2d Cir. 2017); *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995).

According to these principles, the 2011 Agreement unambiguously does not apply to the Section 107 costs as to the portions of OU-2 and the Expanded Territory that RACER seeks in Count 1. The 2011 Agreement begins with a statement of its purpose: "WHEREAS, the Debtors have environmental liabilities at certain of the properties set forth and defined in Attachment A (the 'Properties') and many of those Properties have been and/or will be the subject of environmental response activities and other work." A-422. Next, the 2011 Agreement provides, "'Properties'" shall mean the 89 properties set forth on Attachment A. A-430 at ¶ 20. Attachment A refers to the site as Site 1010, "GM-IFG Syracuse," A-510, a phrase that is further explained by the Trust Agreement attached to the 2011 Agreement, A-427 at ¶ 4, and which contains the metes-and-bounds description of "GM-IFG Syracuse" to include only the property on which the former Plant was located, A-586-88.[8]

Next, the 2011 Agreement explains the "Purposes and Formation of [RACER]" are "to conduct, manage and/or fund Environmental Actions with respect to certain of the Properties, including the migration of Hazardous Substances emanating from certain of Properties, in accordance with the provisions

[8] The Trust Agreement, too, explains RACER's purposes and functions as requiring performance of environmental response "with respect to the Properties or migration of Hazardous Substances emanating from certain of the Properties," A-528 at § 2.3; *see also* A-539 at § 4.3—*not* with respect to "surrounding areas where Hazardous Substances . . . otherwise have or will come to be located," A-421, nor with respect to contaminants at or emanating from Defendants' properties.

of this Settlement Agreement and Trust Agreement." A-431-32 at ¶ 29. In this way, the 2011 Agreement clarifies that "the Properties" to which the document applies include those contaminated by the migration of substances from the former Plant.

Later, the Governments' "Covenants Not to Sue" provides, "[w]ith respect to the Properties (including releases of Hazardous Substances from any portion of the Properties and all areas affected by migration of such substances emanating from the Properties," that the Governments "covenant not to sue or assert any administrative or other civil claims or causes of action against Debtors [or] [RACER Trust]." A-475-76 at ¶ 94. Thus, this paragraph provides RACER with its benefit from executing the 2011 Agreement: freedom from suit if it volunteers to undertake its role to remediate the Properties. Here again, the 2011 Agreement makes clear that it only covers the "Property," i.e., the Plant/OU-1, and areas contaminated by migration from the Plant.

The "Reservation of Rights and Regulatory Authority" section regards the limits on the Governments' covenants not to sue, providing that the Governments "specifically reserve all rights against Debtors with respect to," *inter alia*, "any site that is not a Property, other than claims or causes of action for migration of Hazardous Substances emanating from a Property." A-480 at ¶ 100(vii). It thus provides that the Governments retain their rights to sue for locations that are not

covered by the 2011 Agreement, and then specifically names the locations that are *not* covered by the 2011 Agreement as *anyplace other than the Plant and locations contaminated by substances migrating from the Plant*.

Lastly, the "Contribution Protection" that RACER Trust enjoys as a result of the 2011 Agreement—and the concomitant limitation on RACER's right to seek Section 107(a) recovery costs from PRPs—expressly defines the "matters addressed" therein for purposes of CERCLA. *See United States v. Se. Pa. Transp. Auth.*, 235 F.3d 817, 823 (3d Cir. 2000) ("[I]ncluding a definition of matters addressed in the decree will foreclose future arguments over the scope of the contribution protection."); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 768 n.14 (7th Cir. 1994) ("Nothing prevents the parties from . . . drafting explicit contribution provisions that obviate any need to consider the breadth of the underlying project."). Paragraph 105 defines "matters addressed" as "all costs of Environmental Actions incurred or to be incurred by [the Governments] relating to or in connection with the Properties, including releases of Hazardous Substances from any portion of the Properties, and all areas affected by migration of such substances emanating from the Properties." A-483-84 at ¶ 105. Paragraph 105 then unambiguously and categorically exempts from the "matters addressed" all those "matters reserved in Paragraph 100." A-483-84 at ¶ 105. This portion, then, refers back to the limitation on the Governments' covenant not to sue, which,

again, exempts from the scope of the 2011 Agreement all property other than the Plant/OU-1 and locations contaminated by migration therefrom.[9]

c. The Court Violated Contract Interpretation Principles in Construing the 2011 Agreement.

To arrive at its conclusion that the 2011 Agreement unambiguously applies to the costs of recovery that RACER seeks in Count 1, the court violated several well-established principles of contract interpretation.

First, the court considered evidence extrinsic to the 2011 Agreement to discern its meaning, which the court was not permitted to do without declaring the contract ambiguous and which the court was not permitted to do in any event at the dismissal stage. *See Bayerische*, 692 F.3d at 56. As discussed above, the court improperly considered the proof of claim evidence; thus, in addition to violating the standards for reviewing a motion to dismiss by erroneously incorporating by reference the proofs of claim, the court violated the principles of contract law by considering the proofs of claim as evidence extrinsic to the 2011 Agreement.

[9] That the specific reservation of rights in Paragraph 100 applies "against Debtors" is of no moment. A-479-81 at ¶ 100. The Government signatories to the 2011 Agreement had no need to specifically reserve the right to recover *particular* response costs from RACER Trust, which was created by the settlement, or RACER Properties LLC, which did not even exist at the time; because those entities indisputably did not own or operate the Property and were not PRPs, they could not be responsible for *any* response costs. Here, the significance of Paragraph 100 is that it crystallizes the precise liability that the 2011 Agreement "resolved," 42 U.S.C. § 9613(f)(2): "yes" to resolution at Properties and in places where hazardous substances migrated from Properties, and "no" to resolution in places where those substances traveled by other means.

The court considered other evidence extrinsic to the 2011 Agreement as well, namely, EPA's actions after the execution of the 2011 Agreement. The court determined that EPA's post-2011 Agreement remediation requests to RACER and its diversion of funds for use in certain areas establish EPA's "practical understanding of the scope of the 2011 Agreement." SA- 37. The court then deemed EPA's intent largely incontrovertible, going so far as to suggest that RACER could not possibly have any evidence of contractual intent to the contrary. SA-37 n.8.

The court thus not only considered evidence extrinsic to the 2011 Agreement but did so on the very same page where it denied that the 2011 Agreement is ambiguous. SA-37 & n.8. Effectively, the court gathered evidence of the parties' intent in executing the 2011 Agreement and then credited that evidence over other evidence of intent, which RACER had no opportunity to produce. *See DiFolco*, 622 F.3d at 113 ("In ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the duty of the court is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." (quotations omitted)). This violates the court's role in two respects: in interpreting the 2011 Agreement as a matter of law and, more broadly, in considering GE's motion to dismiss as a matter of law.

Similarly, rather than construing all facts in the complaint in RACER's favor, *see Kaplan*, 999 F.3d at 854, the court relied on other portions of the record to infer facts contrary to the allegations in RACER's complaint, including that OU-2 and the Expanded Territory are indistinguishable. The court stated, "[P]laintiffs' failure to point to any meaningful analytical difference between the two areas amounts to a concession that they should be treated the same." SA-20. To reach this conclusion, however, the court had to disregard the allegations in the complaint and the underlying documents explaining the difference between the two areas. *See, e.g.*, A-27 at ¶¶ 66 (stating the "OUs are geographically distinct, and neither overlaps with the Expanded Territory" and pointing to exhibits), 67 ("OU-1 comprises the distinct tract of real property, south of Ley Creek, on which GM formerly operated the GM-IFG Plant."); A-28 at ¶¶ 69 (defining OU-2 as distinct from OU-1), 71 (defining the Expanded Territory and referencing exhibits); A-82 at ¶ 421 (defining OU-1, referencing an exhibit, and explaining that the Trust Agreement did not reference OU-2 or the Expanded Territory).

For dismissal purposes, the court was required to accept those allegations (supported by the underlying documents) as true, and its failure to do so is another error. *See Kaplan*, 999 F.3d at 854. In short, the court ignored portions of the complaint it was bound to deem as true, instead affording additional weight to

other evidence of contractual intent to conclude that the 2011 Agreement covers all OU-2 and Expanded Territory costs sought in RACER's Section 107 claim.

Finally, the court was required to read the entire contract as a whole and without placing undue emphasis on particular words or phrases. *Law Debenture Tr. Co.*, 595 F.3d at 468. "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing," nor may they "make or vary the contract to accomplish their notions of abstract justice or moral obligation." *Id.* (alterations and quotations omitted). Rather, contracts must be construed to "give meaning to every paragraph, clause, phrase and word, omitting nothing as meaningless, or surplusage." *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) (quotations omitted). Instead, the court interpreted the 2011 Agreement to render wholly inoperative the language that conditions the scope of the matters it addresses to "areas affected by the migration of such substances emanating from" OU-1. A-423; A-431-32 at ¶ 29; A-475-76 at ¶ 94; A-80 at ¶ 100(vii); A-483-84 at ¶ 105.

d. The 2011 Agreement is at Least Ambiguous, Which Precludes Dismissal

This Court need not agree that the 2011 Agreement unambiguously does not apply to the costs that RACER seeks in Count 1 because the 2011 Agreement is at least ambiguous, which precludes dismissal in any event. *See Bayerische*, 692

F.3d at 56; *Orlander*, 802 F.3d at 294-95. Indeed, the District Court concluded as much in its analysis, noting—in spite of the metes-and-bounds description of the Property, A-586-88—that the portion of the 2011 Agreement that sets out the "matters addressed" by the agreement contains two "obvious references that need clarification," namely, "the definition of a Property" and "the matters reserved in Paragraph 100 of the 2011 Agreement." SA-24. The court recognized that "the matters addressed and reservation of rights sections of the 2011 Agreement use language that is not quite perfectly congruent." SA-38 n.9. Finally, it concluded that *only* by imputing information from the proofs of claim could it resolve ambiguities in the 2011 Agreement:

> As the reference to *yet another* different piece of language should make plain, we still have yet to hit the bottom of the rabbit hole in terms of the provisions at play in sorting out what the 2011 Agreement actually covered. Instead, resolving what all was included in the covenant not to sue means turning to the Proofs of Claim.

SA-25. As discussed, the incorporation by reference of those proofs of claim was error as a matter of procedure, *supra* Part I.C, and as a matter of contract interpretation, *supra* Part II.A.1.c.

Even if the proofs of claim were properly considered, however, they establish, at most, only that the 2011 Agreement is ambiguous. Specifically, the court relied on the proofs of claim to establish that "plaintiffs' liability for the contamination in OU-2—and by further extension the Expanded Territory—was

'expressly specified' by the covenants not to sue and sits outside the Governments' reservation of rights," SA-28, while the 2011 Agreement expressly states that the covenants not to sue and the reservation of rights are determined with reference to what areas are "affected by migration of . . . substances emanating from the Properties," A-475-76 at ¶ 94; A- 480 at ¶ 100(vii); A-483-84 at ¶ 105. Any conflict in the interpretation of these provisions requires development of the factual record, precluding dismissal. *See Bayerische*, 692 F.3d at 56.

1. Section 113 Claims

RACER's Section 113 causes of action in Counts II and X require RACER to have pleaded all of the same elements as a Section 107 claim, *supra* Part II.A.1.a, with the following additional elements:

- That RACER "has resolved its liability to the United States or a State for some or all of the costs" of "an administrative or judicially approved settlement." 42 U.S.C.A. § 9613(f)(2), (3)(B).

  RACER alleged that it was established to conduct, manage and/or fund environmental actions with respect to a discrete list of properties formerly owned by GM, and it settled GM's and its liabilities to the Governments in 2015 and 2021. A-81-87 at ¶¶ 414-42. RACER's two Section 113(f)(3)(B) claims were tied to contribution costs to the extent that the 2015 Agreement (Count 2) and the 2021 Agreement (Count X) are administrative or judicially approved settlements, not as a result of the 2011 Agreement. *See* A-91-92 at ¶¶ 467-71; A-98 at ¶¶ 507-11.

- That the Defendants in this matter were not parties to the settlement. 42 U.S.C.A. § 9613(f)(2), (3)(B).

RACER alleged the 2015 Agreement was between NYSDEC and RACER and the 2021 Agreement was between EPA and RACER. A-85-87 at ¶¶ 430-42.

These claims, too, were timely. A Section 113 contribution claim must be filed within 3 years of the "entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C.A. § 9613(g)(3)(B). The initial complaint in this matter was filed on October 26, 2018, fewer than 3 years after the execution of the 2015 Agreement on October 27, 2015. Doc. 1; A-85 at ¶ 431; A-125. The second amended complaint was filed on November 17, 2021, fewer than 3 years after the execution of the 2021 Agreement on September 30, 2021. A-87 at ¶ 439; A-678.

Notwithstanding that RACER's complaint contains sufficient allegations to support each element of both Section 113 causes of action and that those claims were timely, the court erroneously concluded that neither the 2015 nor the 2021 Agreement constituted a basis for contribution. SA-39-41. In so concluding, the court both failed to deem as true the allegations in RACER's complaint and misconstrued the plain terms of both agreements.

a. The 2015 Agreement

By the 2015 Agreement, which defined OU-2, RACER agreed to perform remedial design and remedial action for OU-2, tasks that had not been agreed to in the 2011 Agreement. A-109-10 at ¶¶ 5, 8; *see* A-85-87 at ¶¶ 430-36. As to the

2015 Agreement, the court erred by relying exclusively on the 2015 ROD; the court made no reference to the 2015 Agreement, which contains the actual terms of the parties' agreement, *see* SA-16, 19, 22, 23 n.4, 39-40, 41, as RACER alleged in its complaint, A-17-18 at ¶¶ 6, 8; A-85-87 at ¶¶ 430-36; A-92 at ¶ 470. Although the 2015 Agreement expressly incorporates the 2015 ROD, A-109 at ¶ 6, the 2015 ROD itself is not a contract at all but is instead EPA and NYSDEC's opinion as to the appropriate remedy for OU-2, A-141. It was in the 2015 Agreement that RACER agreed to execute that remedy. A-110 at ¶ 8. Thus, the court strayed from the allegations in the complaint to consider only a portion of the language applicable to the contribution claim arising from the 2015 Agreement.

b. The 2021 Agreement

In the 2021 Agreement, RACER agreed to fund the remedial design for additional portions of OU-2 *and, for the first time, the Expanded Territory*. A-654 at ¶¶ 1-2 ("This Settlement provides for the performance of a Remedial Design ("RD") by [RACER] and the payment of certain response costs incurred by the United States at or in connection with [OU-2] as well as the Expanded Territory . . . ."); A-655-56 at ¶ 9 (defining "[e]xpanded territory" as distinct from OU-2); A-659 at ¶ 13; A-675-76 at ¶¶ 72-73. It also clarified that that the two were distinguishable: "For purposes of this Settlement, OU-2 shall not include the Expanded Territory." A-657; *see* A-661 at ¶ 26(a)-(b).

Rather than accepting this express language, the court essentially declared the 2021 Agreement void for lack of consideration; it apparently interpreted the 2021 Agreement to cover all costs of all types in all areas of or near the Site, no matter what geographic or topical expansion of RACER's obligations EPA might ever seek to impose. SA-40-41. By this analysis, the court interpreted the 2021 Agreement to impose no new obligations.[10] *Id.* Neither the unambiguous language of the 2011 Agreement—in which the parties did not purport to describe or impose any obligations as to the Expanded Territory—nor the very fact of EPA and RACER's execution of the 2021 Agreement supports this conclusion.[11] Further, as with the 2011 Agreement, to the extent that the language of the 2021 Agreement is ambiguous—based on EPA's statement that it refuses to acknowledge a distinction between OU2 and the Expanded Territory in an agreement defining the two differently, for example—the ambiguity of the 2021 Agreement precludes dismissal. *See Bayerische*, 692 F.3d at 56.

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[10] The court interpreted EPA's requests for RACER to complete work in additional areas as signaling EPA's understanding that the 2011 Agreement included those obligations, but it did not interpret EPA's execution of the 2015 or 2021 Agreements in such a way. Although both agreements constitute extrinsic evidence that the court could not consider in interpreting the 2011 Agreement, the incongruency in the court's assignment of persuasive effect is further indication that the court impermissibly weighed evidence. *See supra* Part II.A.1.c; *DiFolco*, 622 F.3d at 113.

[11] Aside from improperly invalidating the 2021 Agreement, the court went so far as to suggest that RACER and the EPA had somehow colluded to falsely preserve RACER's claims against other PRPs. This Court should disregard this statement entirely and should reassign this matter on remand. *See infra* Part III.

Additionally, the enforceability of the 2021 Agreement was not properly before the court. Notwithstanding the use of contract interpretation principles to determine the scope of the agreements at issue, this is not a breach of contract dispute. This is particularly so at this procedural posture, when the allegations of the complaint—including that the 2021 Agreement has resulted in additional costs not covered by prior agreements—must be accepted as true. *See Kaplan*, 999 F.3d at 854. Moreover, the EPA, as signatory to the 2021 Agreement, would be a necessary party to any action declaring the 2021 Agreement void. *See* Fed R. Civ. P. 19(a); *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 708 (S.D.N.Y. 1997) (collecting cases supporting that all contracting parties are necessary parties in a contract dispute).

B. State Claims

Having dismissed RACER's federal law claims, the District Court declined to exercise supplemental jurisdiction over RACER's state law causes of action, dismissing them without prejudice. SA-45; *see* 28 U.S.C.A. § 1367(c)(3). Because the dismissal of the state claims was contingent on the dismissal of the federal, if this Court vacates the dismissal of any of RACER's federal claims, it should also vacate the dismissal of the state law claims. *See RACER Tr.*, 10 F.4th at 105-06; *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 27 (2d Cir. 2014); *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 343 (2d Cir. 2006); *Kruse v. Wells Fargo*

Home Mortg., Inc., 383 F.3d 49, 62 (2d Cir. 2004). Should RACER's federal claims proceed, the District Court should exercise supplemental jurisdiction over the state law claims because "they are so related . . . that they form part of the same case or controversy." 28 U.S.C. § 1367(a). RACER also pleaded facts that, accepted as true, sufficiently state claims for relief pursuant to state law. *See* N.Y. NAV. LAW §§ 176(8), 181(5) (McKinney 2022); *White v. Long*, 85 N.Y.2d 564, 576-70 (N.Y. 1995); A-92-97 at ¶¶ 472-500.

III. This Matter Should be Reassigned on Remand

Finally, if the complaint is reinstated, in whole or in part, RACER requests that the matter be reassigned on remand.

This Court has held that reassignment is "occasionally warranted, even in the absence of bias, to avoid an appearance of partiality." *Ketcham v. City of Mount Vernon*, 992 F.3d 144, 152 (2d Cir. 2021) (quotations omitted). Factors relevant to a request for reassignment include

> whether the original judge would reasonably be expected upon remand to have substantial difficulty inputting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, . . . whether reassignment is advisable to preserve the appearance of justice, and . . . whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. (quotations omitted). For example, this Court ordered reassignment when the court commented that the appellant's arguments were "nonsense," "drivel," a

"fraud," and a "lie," concluding that the "appearance of justice would be well-served by reassignment on remand," even if the trial court judge could objectively view the case, which was itself "questionable." *Shcherbakovskiy v. Da Capo al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007). Similarly, in *Szafran v. Sandata Tech., Inc.*, 205 F. App'x 864, 869 (2d Cir. 2006), this Court reassigned a case on remand "given the District Court's strong belief in the illegality of the [contract at issue], and its finding that the parties and their counsel had acted fraudulently by failing to raise the issue."

Similar circumstances exist here. In addition to a series of disparaging comments directed toward RACER and its earnest legal arguments,[12] the decision contains an overt accusation that EPA and RACER have conspired to extend expired claims by executing the 2021 Agreement. In declaring the 2021 Agreement unenforceable—a question that was not before it—the court stated, "It would be a simple enough matter for any party with a once-valid but now-expired contribution claim to go to the EPA, ask for a new consent decree covering the same subject matter, and brandish their new claim to gather funds from other PRPs." SA-41. Such an accusation is wholly false, unsupported by any evidence, legally unsound, and contrary to EPA's statutory obligations and the purposes of

[12] For example, the court deemed RACER's arguments "incredibl[e]," "nonsense," and "perplexing" and its decision-making "troubling." SA-25 n.5, 33 n.7, 46. It criticized RACER for letting its claims "rot on the vine," stated that RACER is seeking "a jury-rigged escape valve," suggested that the lawsuit is RACER's "last-ditch effort[] to escape [its] fate," and noted that RACER seeks "free rein to make new law." SA-42-43.

CERCLA, RACER's fiduciary obligations, and RACER's attorneys' ethical obligations. Moreover, this language suggests not only that the court views this case with particular disdain but also that if this matter is before the District Court a third time, the "appearance of justice would be well-served by reassignment." *Shcherbakovskiy*, 490 F.3d at 142.

Further, no waste or duplication of effort or resources is implicated by reassignment because of the early status of the case, which has not proceeded beyond the filing of the complaint. *See id.* (concluding that, because the court's judgment was a default judgment, reassignment "poses no costs in judicial economy"). Indeed, RACER commenced this litigation in October of 2018. Doc. 1. Its complaint was twice dismissed and twice appealed to this Court. If this second appeal is successful, this case will be four years old with no more progress than the day it was first filed. *See Mackler Prods. Inc. v. Cohen*, 225 F.3d 136, 147 (2d Cir. 2000) (granting reassignment for a case that had been litigated for eight years and involved two appeals that "rais[ed] largely the same questions").

Judicial economy considerations also support reassignment given the likelihood of additional appeals from additional anticipated dismissals. The court has already made provision for the filing of additional motions to dismiss, even if this matter is before it for a third time. *See* A-9 at Doc. 333 (setting the deadline for "[d]efense motions on common issues" (pursuant to which GE's motion to

dismiss was filed) and noting that "[a]ll deadlines for discovery and to answer the complaint are stayed until after the *first round of motions to dismiss* are resolved" (emphasis added)).

In these exceptional and regrettable circumstances and in an abundance of caution, reassignment will best serve the interests of moving this case toward resolution, avoiding the excess use of judicial resources in these continued appeals, and guarding against the inevitable appearance of injustice. *See Mackler Prods. Inc.*, 225 F.3d at 147 ("[Reassignment] is meant to bring this matter to an expeditious and equitable conclusion in a manner designed to avoid any question, legitimate or not, about the justice of that conclusions.").

CONCLUSION

To reinstate RACER's complaint once again, this Court need analyze no more than the procedural mechanisms by which this matter was decided. Presented with evidence extraneous to the complaint, the court neither excluded that evidence nor converted the matter to a summary judgment, in contravention to Rule 12(d) and requiring vacatur. Otherwise, RACER's complaint asserts valid and timely CERCLA claims and, once those claims are properly reinstated, the court should exercise supplemental jurisdiction over RACER's related state law claims. The court's handling of this matter also calls for reassignment upon remand.

Date: September 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 13,990 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Microsoft 365 MSO (Version 2205 Build 16.0.15225.20394) 64-bit in 14-point Times New Roman font.

/s/ Jeffrey D. Talbert
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Dated: September 13, 2022

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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RACER PROPERTIES LLC and EPLET, LLC, not individually but solely in its representative capacity as Administrative Trustee of Revitalizing Auto Communities Environmental Response Trust,

Plaintiffs,

-v- 5:18-CV-1267

NATIONAL GRID USA, et al.,

Defendants.

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United States District Judge

MEMORANDUM-DECISION and ORDER

■ INTRODUCTION

On October 26, 2018, plaintiffs Racer Properties LLC ("Racer Properties") and EPLET, LLC ("EPLET" and with Racer Properties "plaintiffs") on behalf of Revitalizing Auto Communities Environmental Response Trust ("RACER") filed a complaint in this District. At its core, plaintiffs' complaint sought money damages to recover the expenses they accrued cleaning pollution caused by dozens of defendant companies (together "defendants") over dozens of years at Onondaga Lake near Syracuse, New York.

That complaint has since been amended twice, but at present plaintiffs assert ten claims for relief against defendants: (1) cost recovery under 42 U.S.C. § 9607(a) ("§ 107") of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); (2) contribution under 42 U.S.C. § 9613(f) ("§ 113") of CERCLA; (3) response costs and damages under § 181(5) of the New York Navigation Law; (4) contribution under § 176(8) of the New York Navigation Law; (5) negligence under New York common law; (6) public nuisance under the New York common law; (7) restitution under the New York common law; (8) contribution or indemnification under New York common law; (9) declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201; and (10) a second claim for contribution under § 113 based on events taking place after the first amended complaint had been filed.

On February 16, 2022, defendants moved to dismiss the Second Amended Complaint. That motion, having been fully briefed, will now be decided on the submissions and without oral argument.

[redacted] BACKGROUND[1]

Onondaga Lake has long been infamous for its pollution. *Revitalizing Auto Cmtys. Ennv't Response Tr. v. Nat'l Grid USA* ("*RACER I*"), 2020 WL 2404770, at *2 (N.D.N.Y. May 12, 2020). As a result, it comes as little surprise that in 1993 the lake and its immediate environs were added to the National Priorities List of potential CERCLA sites to kickstart a cleanup. *Revitalizing Auto Cmtys. Ennv't Response Tr. v. Nat'l Grid USA* ("*Racer II*"), 10 F.4th 87, 93 (2d Cir. 2021).

But explaining *how* Onondaga Lake came to be so polluted requires taking a step back. Beginning in the mid-1950s, automotive manufacturer General Motors ("GM") built car parts out of the Syracuse Inland Fisher Guide Plant (the "IFG Plant"). Dkt. 334 ("SAC") ¶¶ 392, 394. Building those parts required hydraulic oils containing substances called polychlorinated biphenyls ("PCBs"), which are apparently particularly destructive to the environment. SAC ¶¶ 394-96.

In the course of disposing of its waste, the IFG Plant caused PCBs to enter the watershed of Ley Creek. SAC ¶¶ 394-96. Ley Creek, in turn, is one of

[1] The facts are taken from the Second Amended Complaint, as well as any documents attached to it or incorporated by reference. However, because many relevant facts have already been discussed at some length in prior decisions, the parties' familiarity will largely be assumed for brevity's sake. Recent developments unique to the Second Amended Complaint and factual allegations relevant to the present motion practice will nevertheless be discussed.

Onondaga Lake's tributaries. SAC ¶ 1. It is also one of the most significant sources of its pollution. *See id.*

The IFG Plant was situated well upstream—that is, to the east—of Onondaga Lake. *See* Dkt. 334-19, p. 4. In fact, its property abuts Townline Road, where Ley Creek begins. *Id.* From the IFG Plant, Ley Creek travels under the LeMoyne Avenue Bridge, before flowing past the Route 11 Bridge furthest to the west. *See* SAC ¶ 64; Dkt. 334-19, p. 4. Of course, though plaintiffs acknowledge that the IFG Plant caused PCBs to enter the Ley Creek watershed, SAC ¶ 395, they also attribute that pollution to defendants, *see id., passim.*

As a result, the State of New York began to put pressure on GM to clean up after itself some time around 1985. *See* SAC ¶¶ 399-400. Ultimately, the New York State Department of Environmental Conservation ("NYSDEC") and GM entered into a consent decree that year to investigate and then redress the pollution at the IFG Plant. *Id.* ¶ 400.

That consent decree proved to be the first of many. *See* SAC ¶¶ 405-10. Working in concert with New York, GM slowly began to work towards cleaning up the pollution at and resulting from the IFG Plant. *RACER II*, 10 F.4th at 94. Eventually, and perhaps due to the strain of trying to remediate the area, GM shut down the IFG Plant in 1993, around the same

time Onondaga Lake was added to the National Priorities List. SAC ¶¶ 397-404; *see RACER II*, 10 F.4th at 93-94.

On June 1, 2009, GM declared bankruptcy. *RACER I*, 2020 WL 2404770, at *2. But of course, GM's lack of funding did not make the environmental consequences of its long-term business practices disappear. *See id.* Instead, the Saint Regis Mohawk Tribe joined New York and pursued GM in bankruptcy court, hoping to find a solution to ensure that the Onondaga Lake cleanup continued apace. *Id.*

The Environmental Protection Agency for the United States of America (the "EPA") was also after GM at the same time, and filed a Proof of Claim alleging nationwide pollution against it on November 30, 2009. Dkt. 346-2, p. 2. A second proof of claim followed on March 1, 2011. Dkt. 346-3, p. 3.

On March 29, 2011, the EPA, New York, and the Saint Regis Mohawk Tribe (together the "Governments") entered into yet another consent decree with GM (the "2011 Agreement"). *RACER I*, 2020 WL 2404770, at *3. Functionally, the 2011 Agreement set aside about $31 million to remediate the area polluted by the IFG Plant. *Id.* RACER was created to carry on GM's work on that project, EPLET was formed to operate as RACER's trustee, and Racer Properties holds the title to the IFG Plant. *Id.* at *3, 7. Because trusts cannot take legal action on their own, EPLET signed the 2011 Agreement on RACER's behalf. *RACER II*, 10 F.4th at 94.

Thus, plaintiffs found themselves charged with finishing at least a portion of GM's work remediating the pollution caused by the IFG Plant. From a purely geographical perspective, there are (at least) two ways to look at the area entrusted to plaintiffs to remediate.

First, there is the functional definition, which divides the IFG Plant into two distinct operational units ("OUs"). Second, the EPA and NYSDEC defined the entire Onondaga Lake cleanup project as consisting of twelve distinct "subsites." SAC ¶ 62. As is relevant here, in a Proof of Claim filed in 2009, the EPA explained that five subsites bear at least some relation to the properties plaintiffs are charged to remediate. Dkt. 346-2, p. 67.[2]

To make those abstract descriptions a little more concrete, start with the two OUs plaintiffs point to, creatively named OU-1 and OU-2. *RACER II*, 10 F.4th at 94. Of the $31 million initially set aside for RACER's remediation project, $22.57 million was earmarked for OU-1, which, according to plaintiffs, consists of the real property of the IFG Plant. *Id.*; SAC ¶ 67. The remaining $8.55 million was set aside for OU-2. *RACER II*, 10 F.4th at 94.

OU-2's relationship to the IFG Plant is somewhat more complicated. According to plaintiffs, OU-2 consists of about "9,200 linear feet of Ley Creek channel sediments, surface water, and adjacent floodplain soils/sediments

[2] Pagination Corresponds with CM/ECF. As will be discussed in greater detail below, the EPA's Proofs of Claim can be considered for the present motion practice because they are incorporated by reference into the 2011 Agreement.

upstream of the eastern edge of the Route 11 Bridge and downstream of the western edge of the Townline Road Bridge," as well as several acres of nearby wetlands. SAC ¶ 69. In other words, OU-2 consists of Ley Creek's bed from Townline Road in the east to the Route 11 Bridge to the west. *See id.*

Alternatively, the areas targeted for remediation can be thought of using the EPA's subsite scheme. Though the overlap between plaintiffs' OUs and the EPA's subsites can be a little murky, plaintiffs have helpfully explained where the two methods of description line up. As a result, three of the five subsites the EPA claims as related to the IFG Plant need a bit of explanation. To begin, Subsite 2 consists of "certain areas alongside Ley Creek . . . including the [eighty-five] acres on which GM operated the IFG [Plant]." Dkt. 346-2, p. 68. In other words, there is no apparent practical difference between OU-1 and Subsite 2. Dkt. 357, p. 31 n.12.

Subsite 4 "includes approximately [eighteen] acres of banks alongside Ley Creek," especially where Onondaga County placed PCB-contaminated dredging in the 1970s and 1980s. Dkt. 346-2, p. 69; SAC ¶ 425. For its part, Subsite 5 "includes certain downstream banks of Ley Creek." Dkt. 346-2, p. 70. Plaintiffs acknowledge that Subsite 5 makes up OU-2. Dkts. 334-19, p. 4; 357 p. 31, n.12.

According to the Proofs of Claim, PCBs are present at each of those three subsites because of GM, and specifically the IFG Plant. Dkt. 346-2, pp. 68-70.

However, in their complaint, plaintiffs allege that the contamination anywhere other than OU-1 was caused either by: (1) New York's own project which relocated Ley Creek in 1951; or (2) Onondaga County's placing dredged soil on the north and south banks of Ley Creek in the 1970s and 1980s. SAC ¶ 425. According to plaintiffs, the Governments were aware at the time the 2011 Agreement was signed that OU-2 and the expanded territory were contaminated not because of migration or emanation, but from these external forces. *Id.* ¶ 428.

Regardless of how the two areas came to be contaminated, RACER went about its work in short order. In 2013, RACER completed a remedial investigation and feasibility study for OU-2. *RACER II*, 10 F.4th at 94. In 2015, the EPA and NYSDEC "issued a Record of Decision describing the remediation activities they wished RACER to undertake with respect to OU-2." *Id.*

However, the relatively smooth cleanup would soon hit its first snag. At some point after 2015, NYSDEC directed RACER to take soil samples for some properties that plaintiffs claim were beyond the bounds of OU-2. *RACER II*, 10 F.4th at 94-95. Plaintiffs have taken to calling these lands the "expanded territory." *Id.*

The so-called "expanded territory" consists of land on the north and south banks of Ley Creek running from along the IFG Plant in the east to the

easternmost edge of the Route 11 bridge in the west. Dkt. 334-19, p. 4. When the results of RACER's sampling came back, they apparently indicated that the expanded territory was contaminated as well. *RACER II*, 10 F.4th at 95.

According to plaintiffs, RACER was not obligated under the 2011 Agreement to redress contamination at either OU-2 or the expanded territory. SAC ¶ 5. But plaintiffs *do* claim that defendants are responsible for contaminating both areas, and plaintiffs seek to hold defendants liable for the costs incurred in the cleanup. *Id.* ¶ 2.

To that end, RACER and Racer Properties filed a complaint in this District on October 26, 2018. Dkt. 1. All defendants then moved to dismiss plaintiffs' complaint, most on November 13, 2019, while others moved through supplemental briefing on December 3, 2019. Dkts. 255; 294. On May 12, 2020, those motions were granted. Dkt. 312. In addition, RACER was removed as plaintiff and EPLET ordered substituted in for any further proceedings, because a trust cannot bring a lawsuit under New York law. *Id.*

On August 18, 2021, the Court of Appeals for the Second Circuit reversed the dismissal, remanding jurisdiction to this Court to determine in the first instance the merits of defendants' arguments for dismissal other than the concerns regarding ripeness that resulted in the first decision. Dkt. 321. On November 17, 2021, plaintiffs filed the SAC. Dkt. 334.

In the meantime, on September 29, 2021, EPLET entered into another consent decree with the EPA (the "2021 Agreement"). Dkt. 334-25, p. 29; SAC ¶ 439. The 2021 Agreement explicitly covers RACER's activities in OU-2, but explicitly does not cover RACER's activities in the expanded territory. Dkt. 334-25, ¶ 2. That said, for its part, the EPA does not acknowledge any difference between OU-2 and the expanded territory, and instead argues that the former embraces the latter. *Id.*

On February 16, 2022, defendants filed a second motion to dismiss. Dkt. 346. Plaintiffs have responded, and defendants replied. Dkts. 357; 363. This decision now follows.[3]

[redacted] LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That factual matter may be drawn from "the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010).

[3] Plaintiffs have requested oral argument. Dkt. 358. Because oral argument would be neither necessary nor useful, that request must be denied.

Importantly, "the complaint is to be construed liberally, and all reasonable inferences must be drawn in the plaintiff's favor." *Ginsburg v. City of Ithaca*, 839 F. Supp. 2d 537, 540 (N.D.N.Y. 2012) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)). If the complaint and its additional materials—when viewed through that pro-plaintiff lens—are not enough to raise the plaintiff's right to relief above the speculative level, the complaint must be dismissed. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

DISCUSSION

Defendants' arguments in favor of dismissal come under three general categories: (1) CERCLA claims; (2) state law claims; and (3) declaratory relief. However, plaintiffs' complaint relies entirely on its CERCLA claims to maintain jurisdiction. Thus, if those claims fail, the question becomes whether to keep jurisdiction over plaintiffs' complaint at all. If those claims survive, each category will be considered in turn.

A. CERCLA

Plaintiffs bring three total claims under CERCLA: (1) a § 107 cost recovery claim; (2) a § 113 contribution claim based on the 2015 Record of Decision; and (3) a § 113 contribution claim based on the 2021 Agreement.

Section 107(a) of CERCLA provides that "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in [§ 107](b)," a party responsible for pollution "shall be liable for . . . necessary

costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a). In other words, if one party cleans up a contaminated area and incurs expenses in doing so, that party can recover the costs of their cleanup from other responsible entities. *See id.*

By contrast, CERCLA's § 113 allows a potentially responsible party ("PRP") who has been exposed to liability to seek contribution for that liability from other PRPs. 42 U.S.C. § 9613(f). There are two subcategories of CERCLA contribution claims: (1) § 113(f)(1) claims; and (2) § 113(f)(3)(B) claims. A § 113(f)(1) claim comes into play when a PRP has been sued and found liable for cleanup costs. 42 U.S.C. § 9613(f)(1). A § 113(f)(3)(B) claim, by contrast, arises when a PRP enters into a settlement agreement with a state or the United States and seeks to receive contribution from other PRPs for costs incurred as a result of that settlement. *Id.* at § 9613(f)(3)(B). Given the absence of any completed litigation, the parties do not dispute that if plaintiffs successfully state a § 113 claim, § 113(f)(3)(B) best fits the facts of this case.

A § 113(f)(3)(B) contribution claim has a three-year statute of limitations. *Consol. Edison Co. v. UGI Utils., Inc.*, 423 F.3d 90, 98 (2d Cir. 2005). That clock begins to tick once a consent decree is approved by the relevant court. *New York v. Solvent Chem. Co., Inc.*, 664 F.3d 22, 26 (2d Cir. 2011). Of course, the approval of a consent decree often signals only the beginning of a

CERCLA cleanup, and, as a result, savvy plaintiffs will typically seek contribution and declaratory judgments soon after entering into the consent decree. *Id.* at 26-27.

That being said, a consent decree only begins the limitations period if it resolved the plaintiff's liability to the United States or a state. *See Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc*, 596 F.3d 112, 126 (2d Cir. 2010). In other words, it is not the execution of the consent decree in the abstract, but rather the act of resolving the plaintiff's CERCLA liability that triggers a § 113 claim and begins the limitations period's countdown. *ASARCO LLC v. Goodwin*, 756 F.3d 191, 202 (2d Cir. 2014).

Now, because § 107 and § 113 claims offer decidedly different relief, the obvious question that follows is why they are being considered together. The answer is that when a plaintiff meets the requirements to bring a § 113(f)(3)(B) claim, it loses the ability to alternatively proceed under § 107. *RACER II*, 10 F.4th at 103. By extension, if plaintiffs had a viable § 113 claim for any harm that they allege now, § 107 would not afford them a remedy. *See id.* And if that § 113 claim is time-barred, plaintiffs are simply out of luck.

According to defendants, that is precisely where plaintiffs find themselves now. After all, defendants argue that the 2011 Agreement resolved all of plaintiffs' CERCLA liability concerning OU-2 and the expanded territory. In

that case, plaintiffs' CERCLA claims are time-barred, one and all. Needless to say, plaintiffs see things differently.

Though the dispute may appear straightforward at first blush, that single disagreement is actually properly expressed as three. That is because there are three different agreements at play: (1) the 2011 Agreement; (2) the 2015 Record of Decision; and (3) the 2021 Agreement. Each agreement's capacity to establish plaintiffs' liability for OU-2 and the expanded territory must be assessed in turn.

However, as an initial matter, it is worth taking a moment to explain why OU-2 and the expanded territory's liability can be assessed collectively. Much ink is spilled in the complaint arguing how OU-2 came to be contaminated and why the unique circumstances of that contamination make it different from OU-1. Yet the nature of the expanded territory's contamination gets much shorter shrift. Nowhere in the complaint do plaintiffs allege that similar unique circumstances merit a similar break in the analysis between OU-2 and the expanded territory. *See generally*, SAC, *passim*.

Nor do plaintiffs' opposition papers argue that the analysis should be any different for the expanded territory than it was for OU-2. Put together, with the obvious exception of the 2021 Agreement, which explicitly does not cover

the expanded territory, there is no indication in the record that the two regions should be treated differently. Dkt. 334-25, ¶ 2.

Thus, plaintiffs' failure to point to any meaningful analytical difference between the two areas amounts to a concession that they should be treated the same. *See, e.g., Napoli v. Nat'l Surety Corp.*, 2022 WL 1943776, at *6 (S.D.N.Y. May 19, 2022) (collecting cases for proposition that failure to address arguments in responsive briefing amounts to concession of those arguments). Especially because the expanded territory consists of land adjacent to the banks of Ley Creek (or OU-2), the two areas will be treated identically for the purposes of the present motion practice.

1. The 2011 Agreement

Now that that preliminary matter is settled, the analysis begins with the 2011 Agreement. To that end, "contracts with the government are governed by federal common law[.]" *Falls Riverway Realty, Inc. v. City of Niagara Falls, N.Y.*, 754 F.2d 49, 55 n.4 (2d Cir. 1985) (citing *Priebe & Sons v. United States*, 332 U.S. 407 (1947)). But while that may seem like useful guidance on paper, in a practical sense courts are "severely limited" from creating or expanding legal principles unique to federal jurisprudence. *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001).

Thus, in the typical case courts can only create federal common law where the operation of state law would "significantly conflict" with "uniquely federal

interests." *Empire Healthchoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 140 (2d Cir. 2005) (cleaned up).

Instead, courts tend to look closely at state law before developing novel federal solutions to a question of contract interpretation. *See Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH*, 446 F.3d 313, 316 (2d Cir. 2006) ("[I]n developing federal common law in an area, [a court] may look to state law[.]" (cleaned up)). Fortunately enough, "[w]hen it comes to general rules of contract interpretation, there is little difference between federal common law and New York law[.]" *Barnes v. Am. Int'l Life Assurance Co.*, 681 F. Supp. 2d 513, 520 (S.D.N.Y. 2010). Accordingly, in the absence of any indication from either party that some unique federal concern should cause a divergence in this case, New York law will be used for guidance. *McVeigh*, 396 F.3d at 140.

"Under New York law the initial interpretation of a contract is a matter of law for the court to decide." *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's*, 136 F.3d 82, 86 (2d Cir. 1998) (internal citations and quotation marks omitted). That also leaves to courts the antecedent question of whether the terms of a contract are ambiguous. *Id.* If the contract's terms are clear and unambiguous, a court may dismiss a claim rooted in contractual interpretation at the Rule 12(b)(6) stage. *See, e.g.*, *Advanced Mktg. Grp., Inc. v. Bus. Payment Sys., LLC*, 300 F. App'x 48, 49

(2d Cir. 2008) (summary order). But an ambiguity creates a question of fact as to the proper interpretation and precludes dismissal before discovery. *Crowley v. VisionMaker, LLC*, 512 F. Supp. 2d 144, 152 (S.D.N.Y. 2007).

Ambiguous language is language which is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of customs, practices, usages[,] and terminology as generally understood in the particular trade or business." *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). The obvious corollary is that "[t]he language of a contract is not made ambiguous simply because the parties urge different interpretations, or where one party's view strains the contract language beyond its reasonable and ordinary meaning." *Crowley*, 512 F. Supp. 2d at 152 (citing *Seiden Assocs.*, 959 F.2d at 428).

Wrapping all that law together, if the 2011 Agreement unambiguously resolved plaintiffs' liability as to OU-2 and the expanded territory, then plaintiffs' § 113 claims relating to those areas must be dismissed as time-barred and their § 107 claims must be dismissed as foreclosed by their now-defunct § 113 claims. But if the 2011 Agreement is ambiguous, or else if the 2011 Agreement unambiguously does *not* embrace plaintiffs' liability for OU-2, then the analysis must proceed to the 2015 Record of Decision and the

2021 Agreement to determine whether either of those unambiguously allows for a § 113 claim.[4]

To get to the bottom of the parties' dispute, it is worth noting from the jump that consent decrees often include a "matters addressed" section specifically to determine what that consent decree covers. *United States v. Se. Pa. Transp. Auth.*, 235 F.3d 817, 823 (3d Cir. 2000). Functionally, these sections exist to "foreclose future arguments over the scope" of the consent decree's determination of liability. *Id.*

As a result, courts routinely use the "matters addressed" sections of § 113 consent decrees to set the bounds of contribution protection and, thus, the scope of available contribution claims under § 113(f)(3)(B). *See, e.g.*, *New York v. Town of Clarkstown*, 95 F. Supp. 3d 660, 676-77 (S.D.N.Y. 2015).

As it turns out, the 2011 Agreement contains just such a "matters addressed" section. *See* Dkt. 334-20 ("2011 Agreement"), ¶ 105. That section covers:

> all costs of Environmental Actions incurred or to be incurred by the [Governments] or any other person or entity relating to or in connection with the Properties, including releases of Hazardous Substances from any portion of the Properties, and all areas affected by migration of such substances emanating from the Properties; provided, however, that the "matters addressed" in this Settlement Agreement do not include (i) any matters reserved in Paragraph 100 of this Settlement Agreement; or

[4] Plaintiffs nevertheless argue that even if the 2011 Agreement resolved their liability for OU-2 and the expanded territory, the 2015 Record of Decision and/or the 2021 Agreement reset the statute of limitations. That argument will be addressed below.

> (ii) any claims for past costs asserted by [PRPs] who are not parties to this Settlement Agreement.

Id.

Though the 2011 Agreement's matters addressed section provides a useful starting point to construing that document, there are two obvious references that need clarification. First is the definition of a Property. A Property is any of the 89 pieces of real estate identified in Attachment A to the 2011 Agreement. 2011 Agreement, ¶ 20. The IFG Plant is listed among those properties. *Id.* at 96.

The second issue to be resolved are the "matters reserved in Paragraph 100" of the 2011 Agreement. 2011 Agreement, ¶ 105. Paragraph 100 contains the Governments' reservation of rights. *Id.* ¶ 100. As may be expected, that paragraph limits the Governments' covenants not to sue in the 2011 Agreement by noting that they "do not apply to any matters other than those expressly specified therein." *Id.*

In addition, the Governments specifically reserved a number of additional rights against plaintiffs, including: (1) any action to enforce the Governments' rights under the 2011 Agreement; (2) any unsecured claim concerning the portion of Ley Creek to the west (or downstream) of the Route 11 Bridge; and (3) "all rights with respect to any site that is not a Property, other than claims or causes of action for migration of Hazardous Substances emanating from a Property[.]" 2011 Agreement, ¶ 100.

Of course, because the reservation of rights itself references the 2011 Agreement's covenants not to sue, the scope of the former cannot be resolved without delving into the latter. To that end, through the 2011 Agreement, the Governments covenanted "not to sue or assert any administrative or other civil claims or causes of action against . . . the Environmental Response Trust and the Environmental Response Trust Protected Parties under CERCLA, RCRA, and State environmental statutes, as well as any other environmental liabilities asserted in the Government Proofs of Claim." 2011 Agreement, ¶ 94.

As the reference to *yet another* different piece of language should make plain, we have still yet to hit the bottom of the rabbit hole in terms of the provisions at play in sorting out what the 2011 Agreement actually covered. Instead, resolving what all was included in the covenant not to sue means turning to the Proofs of Claim.[5]

But the Proofs of Claim are not explicitly part of the 2011 Agreement. Nor are they attached to the complaint. Consequently, it first must be

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[5] Despite the covenants not to sue's explicit reference to the Proofs of Claim, plaintiffs incredibly argue that the Proofs of Claim were only included in the preamble to clarify the general scope of the IFG Plant's pollution and have no bearing on the scope of the 2011 Agreement's coverage. Plaintiffs are demonstrably wrong. Although the 2011 Agreement certainly does reference the Proofs of Claim in its preamble as plaintiffs suggest, their argument that defendants mislead the Court by suggesting that that reference does anything to set the bounds of liability established by the 2011 Agreement is powerfully misguided. Dkt. 357, p. 31 n.11. The Proofs of Claim are explicitly referenced—twice—as setting the bounds of the Governments' covenants not to sue. 2011 Agreement, ¶¶ 94-95. That reference goes a long way past mere preamble. Accordingly, plaintiffs' argument must be disregarded.

determined whether that extraneous document can be considered in deciding a Rule 12(b)(6) motion. As it happens, plaintiffs argue that because the Proofs of Claim are extraneous to the 2011 Agreement, they cannot be considered unless the contract is first deemed ambiguous. Plaintiffs are mistaken.

"While a consent decree is a judicial pronouncement, it is principally an agreement between the parties and as such should be construed like a contract." *Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1028 (2d Cir. 1993). Thus, like a contract, a consent decree's scope "must be discerned within its four corners," and a court cannot expand or reduce the agreement actually set down in writing. *Id.* (internal citations and quotation marks omitted). However, documents that are incorporated by reference into a contract "become an intrinsic part" of the contract itself. *Id.*

"A contract may incorporate another document by reference by describing it in such clear and unambiguous terms that its identity can be ascertained beyond reasonable doubt." *Padaguan v. Carnival Corp.*, 709 F. App'x 713, 715 (2d Cir. 2017) (summary order) (citing *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 47 (2d Cir. 1993)). In addition, the parties to the agreement must have "had knowledge of and assented to the incorporated terms." *Local Union 97, Int'l Brotherhood of*

Elec. Workers, AFL-CIO v. NRG Energy, Inc., 561 F. Supp. 3d 322, 330 (N.D.N.Y. 2021).

The Proofs of Claim plainly meet the requirements of incorporation by reference. Regarding the first element, the 2011 Agreement expressly identified them by their document numbers. 2011 Agreement, p. 10. Thus, there can be no reasonable doubt as to what the 2011 Agreement means when it refers to the Proofs of Claim. *Padaguan*, 709 F. App'x at 715.

As to the second element, because EPLET signed the 2011 Agreement, plaintiffs as a whole can be ascribed both knowledge of and assent to the terms of the Proofs of Claim. *NRG Energy*, 561 F. Supp. 3d at 330. Both requirements of incorporation are thus met, and the Proofs of Claim may be considered as an intrinsic part of the 2011 Agreement. *Crumpton*, 993 F.2d at 1028.

That brings the analysis—at last—to the Proofs of Claim.[6] Just as a reminder, the Proofs of Claim establish the bounds of the Governments' covenants not to sue, which in turn interact with the Governments'

[6] Although both Proofs of Claim are incorporated, only the November 30, 2009 Proof of Claim sets out any geographic description of the area at issue. *Compare* Dkt. 346-2, pp. 4-106 (November 30, 2009 Proof of Claim describing areas subject to GM's contamination), *with* Dkt. 346-3, pp. 2-3 (March 1, 2011 Proof of Claim containing no such geographic information). Though the Proofs of Claim will be referred to together to keep the analysis in line with the covenant not to sue's language, all citations will thus be to the November 30, 2009 Proof of Claim.

reservations of rights, which, finally, impose a limit on the matters addressed by the 2011 Agreement.

To that end, functionally the Proofs of Claim allege contamination against GM for certain Subsites of the Onondaga Lake Superfund Site. Dkt. 346-2, pp. 67-72. In particular, the Proofs of Claim established that GM was responsible for contaminating OU-1. *See id.* at 68 (attributing pollution at Subsite 2 to GM); Dkt. 357, p. 31, n.12 (plaintiffs acknowledging that Subsite 2 is OU-1). But the Proofs of Claim also set out that "GM disposed or arranged for the disposal of PCBs" at Subsite 4 which "contributed to the contamination of Subsite 5." Dkt. 346-2, pp. 69-70. Critically, plaintiffs acknowledge that Subsite 5 and OU-2 are the same. Dkt. 357, p. 31 n.12.

In other words, the Proofs of Claim state that OU-2 was contaminated, albeit indirectly, by GM. Dkts. 346-2, pp. 69-70; 357 p. 31 n.12. And once again, in the 2011 Agreement, the Governments consented not to sue based on the Proofs of Claim. 2011 Agreement, ¶ 94. On the contrary, "the Government Proofs of Claim [were] deemed satisfied in full in accordance with the terms of [the 2011 Agreement.]" *Id.* ¶ 95.

By extension, it seems plain that plaintiffs' liability for the contamination in OU-2—and by further extension the expanded territory—was "expressly specified" by the covenants not to sue and sits outside of the Governments' reservation of rights. 2011 Agreement, ¶ 100. In that light, plaintiffs' efforts

to dispel defendants' argument that the 2011 Agreement unambiguously covers plaintiffs' liability for OU-2 and the expanded territory have a steep hill to climb.

Yet plaintiffs resist this straightforward reading of the 2011 Agreement. To their minds, the Governments reserved "all rights with respect to any site that is not a Property, other than claims or causes of action for migration of Hazardous Substances emanating from a Property[.]"
2011 Agreement, ¶ 100(vii). Similarly, plaintiffs note that the covenants not to sue lead off with the prefatory clause "[w]ith respect to the Properties (including releases of Hazardous Substances from any portion of the Properties and all areas affected by migration of such substances emanating from the Properties[.]" *Id.* ¶¶ 94-95. Plaintiffs urge that the 2011 Agreement must therefore be read to *only* cover the Properties themselves and the areas contaminated by migration from the Properties.

And because the complaint alleges that OU-2 and the expanded territory were contaminated by "means other than migration"—particularly the relocation of Ley Creek in 1951 as well as moving dredged soil in the 1970s and 1980s—plaintiffs argue that the 2011 Agreement did not resolve their liability. SAC ¶ 425.

In the abstract, plaintiffs' reading of the 2011 Agreement is theoretically possible. So unless no "reasonably intelligent person who has examined the

context of the entire integrated agreement" could objectively adopt one party or the other's interpretation, the 2011 Agreement is ambiguous and defendants' motion must be denied. *Seiden Assocs.*, 959 F.2d at 428.

Looking at the agreement as a whole, though, no reasonable person could plausibly adopt plaintiffs' reading. The unique posture of a § 113(f)(3)(B) claim makes that analysis somewhat complicated, but when the logic is followed step-by-step the result is clear.

After all, a § 113(f)(3)(B) claim is born when a party's liability under CERCLA is established. *Goodwin*, 756 F.3d at 202. As a result, for plaintiffs' theory of the 2011 Agreement to hold water, there would have to have been some possibility that they could have been held liable under CERCLA for contamination at OU-2 and/or the expanded territory notwithstanding the 2011 Agreement's terms.

No reasonable reading of the 2011 Agreement would leave that possibility open. Remember, in the 2011 Agreement, the Governments: (1) covenanted not to sue for any liability asserted in the Proofs of Claim; (2) deemed the Proofs of Claim satisfied; (3) acknowledged in the Proofs of Claim that OU-2 was contaminated by the same dredging project that plaintiffs rely on in their complaint to *avoid* the 2011 Agreement establishing their liability; (4) included broad language in the "matters addressed" section reaching all costs "relating to or in connection with the Properties, including releases of

Hazardous Substances from any portion of the Properties, and all areas affected by migration of such substances emanating from the Properties"; (5) specifically reserved the ability to sue based on claims for pollution downstream from the Route 11 bridge; and (6) set aside $8,548,471 to remediate OU-2. 2011 Agreement, ¶¶ 63, 94-95, 100(ii), 105; Dkt. 346-2, pp. 69-70.

Putting all of those together, the contract makes it painfully clear that the Government knew full well that OU-2 and the expanded territory were contaminated when the 2011 Agreement was signed, set aside money for plaintiffs to remediate it, and deemed its claims regarding that territory satisfied.

A reasonable person simply cannot read those portions of the 2011 Agreement and the incorporated Proofs of Claim and come away with the understanding that the Governments could still sue plaintiffs under CERCLA for OU-2 or the expanded territory. At the least, a reading that would leave plaintiffs subject to claims that the Governments have explicitly forsworn as extinguished would run powerfully contrary to any reasonable party's expectation. *See, e.g.*, *Everlast World's Boxing Headquarters Corp. v. Trident Brands Inc.*, 2020 WL 917058, at *8 (S.D.N.Y. Feb. 26, 2020) ("A contract should not be interpreted to produce a result that is absurd, commercially unreasonable[,] or contrary to the reasonable expectations of the parties."

(cleaned up) (citing *Greenwich Cap. Fin. Prods., Inc. v. Negrin*, 903 N.Y.S.2d 346, 348 (N.Y. App. Div. 1st Dep't 2010)).

Plaintiffs' arguments to the contrary fail to persuade. First, plaintiffs try to cabin the language in the "matters addressed" section to the Property, or the IFG Plant itself. But once again, by its own plain terms, that section unambiguously extends well beyond the IFG Plant to all costs "*relating to or in connection with* the Properties." 2011 Agreement, ¶ 105 (emphasis added). Plaintiffs nevertheless object that that language could be read incredibly broadly, and is wanting for a limiting principle. *See Maracich v. Spears*, 570 U.S. 48, 60 (2013).

From plaintiffs' point of view, that limiting principle should come back to the migration and emanation language in the matters addressed paragraph. *See* 2011 Agreement, ¶ 105. But interpreting the 2011 Agreement in this way requires the reader to completely ignore the plain text of the consent decree.

The 2011 Agreement frames the "relating to or in connection with" language as *including* emanation, migration, or release from the IFG Plant. *See id.* And as defendants correctly point out, "including" is either "illustrative or enlarging." *New York v. Dep't of Justice*, 951 F.3d 84, 102 (2d Cir. 2020). In neither case would it be limiting, and thus plaintiffs'

reading would require the word "including" to be read out of the contract.[7] *Spinelli v. Nat'l Football League*, 903 F.3d 185, 200 (2d Cir. 2018) (noting that interpretation must give "effect and meaning to every term of a contract and strive to harmonize all of its terms" (cleaned up)).

Such a narrow construction of the matters addressed paragraph would also fly in the face of the typical breadth afforded to the clauses "relating to" and "in connection with." *See, e.g.*, *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001) (noting that "in relation to" is equivalent to "in connection with" and both are broader in scope than the term "arising out of").

Instead, the only faithful reading of the matters addressed section is one that embraces the broad, inclusive language that the parties chose. Given the 2011 Agreement and the Proofs of Claims's specific reference to and

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[7] Once again, plaintiffs take a perplexing argumentative tack in trying to avoid this conclusion. According to plaintiffs, allowing for costs to relate to or arise in connection with the IFG Plant by means other than migration or emanation means reducing the emanation and migration language to surplusage. Nonsense. Examples have value because they make the abstract concrete. That purpose is not taken from them simply because they do not form an exhaustive list. On the contrary, reading a contract to make all inclusive lists exclusive leaves the word "including" with nothing to add to the contract. Plaintiffs' argument must be rejected. *See City of Providence v. Barr*, 954 F.3d 23, 46 (1st Cir. 2020) ("The canon against surplusage is not a straitjacket. It should not, therefore, be employed inflexibly to rule out every interpretation of a [text] that treats certain language as illustrative or clarifying."). Of course, the canon of surplusage only comes into play in the statutory analysis context when there is an ambiguity to discern. *See N.Y. Times Co. v. Newspaper & Mail Deliverers'—Publishers' Pension Fund*, 303 F. Supp. 3d 236, 258 n.10 (S.D.N.Y. 2018). But the same is not true of contractual interpretation. *See, e.g.*, *T.M. Real Est. Holdings, LLC v. Stop & Shop Supermarket Co. LLC*, 543 F. App'x 41, 42 (summary order) (applying preference against surplusage in construing contract at motion to dismiss stage despite finding no ambiguity).

inclusion of OU-2, including OU-2's contamination among that broad category is the obvious outcome.

Similar logic forecloses plaintiffs' argument that the prefatory clause in the covenants not to sue similarly limits the covenants not to sue by tying them to only the Properties. In the abstract, it is theoretically possible that the introductory language "[w]ith respect to the Properties" could be read to limit the scope of those covenants in the manner plaintiffs suggest.

2011 Agreement, ¶¶ 94-95.

But adopting that line of reasoning would make the covenants' explicit references to the Proofs of Claim meaningless. If the Proofs of Claim were *only* satisfied to the extent that they mentioned contamination in the form of natural migration of PCBs, then the covenants not to sue's language of "[w]ith respect to the Properties (including releases of Hazardous Substances from any portion of the Properties and all areas affected by migration of such substances emanating from the Properties)" would cover all the contamination dealt with by the 2011 Agreement on its own with no need of further clarification by reference to the Proofs of Claim.

2011 Agreement, ¶ 94.

That reduction of the 2011 Agreement's text to mere surplusage cannot be how that document was intended to be read. *Spinelli*, 903 F.3d at 200 (noting that contracts should not be read to make language meaningless). Instead,

there is only one way to harmonize the inclusion of the Proofs of Claim and this prefatory language. That is to read that preface as acknowledging the existence of other sites—which are not Properties—but that nevertheless were polluted by GM and were, perhaps, mentioned in the Proofs of Claim. The preface thus limits the scope of contribution protection to *these* Properties, even if the Proofs of Claim might sweep broader and reach sites not among the listed Properties.

In any case, plaintiffs' narrow reading of the matters addressed by the 2011 Agreement is simply too much at odds with the rest of the text. For one thing, the reservation of rights itself explicitly allows that GM may yet be held liable for areas beyond OU-2 and the expanded territory. 2011 Agreement, ¶ 100(ii). But there is no such explicit reservation of liability for those areas themselves.

Both OU-2 and the expanded territory stop right at the eastern edge of the Route 11 Bridge. Dkt. 334-19, p. 4. And the 2011 Agreement expressly leaves open liability for "the entire portion of Ley Creek which is downstream from [or westward of] the Route 11 Bridge[.]" 2011 Agreement, ¶ 100(ii). The inevitable implication is that the area *east* of the Route 11 Bridge is subject to the consent decree and thus not subject to any reservation of rights.

Yet plaintiffs demur. According to them, any references to the Route 11 Bridge in the 2011 Agreement should be disregarded entirely. Otherwise,

"any property between the longitudinal points of Townline Road and the Route 11 Bridge would be covered by the 2011 Agreement, even if the property were located in Canada or Pennsylvania." Dkt. 357, p. 30.

But once again, plaintiffs' reading would require the language preserving liability west of the Route 11 bridge to be discarded entirely as surplusage. Fortunately, there is a way to read the contract that prevents plaintiffs' absurd result while remaining faithful to the plain language of the contract. *See Spinelli*, 903 F.3d at 200.

The only reasonable way to read the contract to achieve both ends is to use the Proofs of Claim to limit the geographical bounds of the area covered by the 2011 Agreement. That way, the 2011 Agreement covers a defined area upstream from the Route 11 Bridge without allowing northward and southward expansion ad infinitum. At the same time, the language in the reservation of rights maintaining the Governments' rights to sue downstream of the Route 11 Bridge suddenly achieves a useful clarifying purpose.

In that light, the Route 11 Bridge becomes a dividing line between what is covered by the 2011 Agreement and what is not, subject to further restrictions to the north and south imported from the Proofs of Claim. Since that is precisely the area that plaintiffs have worked to clean up and that precipitated this lawsuit, that reading is plainly the only reasonable

interpretation of the 2011 Agreement's language. *See* Dkt. 334-19, p. 4 (depicting OU-2 and expanded territory as east of Route 11 Bridge).

That reading also plainly mirrors the Governments' practical understanding of the scope of the 2011 Agreement. The Governments have specifically directed plaintiffs to continue to work to remediate these areas. *RACER II*, 10 F.4th at 94-95. The Governments also specifically diverted $8,548,471 for plaintiffs to use on "the property extending from the facility property boundaries to the Route 11 Bridge." 2011 Agreement, ¶ 63.

And nothing about the addition of the expanded territory strikes the Governments as unusual. *See* Dkt. 334-25, ¶ 2 (EPA noting that "post-ROD expansion of a Superfund site's geographic area [in this case into the expanded territory] is not uncommon"). As a result, the Governments have repeatedly manifested an intention contrary to plaintiffs' interpretation of the 2011 Agreement.[8] The contract should be read so as to honor those expectations. *See Everlast*, 2020 WL 917058, at *8 (noting that contracts must be read to adhere to reasonable expectations of parties).

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[8] From a practical standpoint, even if the 2011 Agreement were deemed ambiguous and plaintiffs' CERCLA claims were allowed to survive the present motion practice, it is unclear how any discovery could benefit them for precisely this reason. The Governments' actions have repeatedly evinced an understanding that plaintiffs are expected to remediate OU-2 and the expanded territory. Any resulting evidence into the Governments' intent would only make that position more explicit, undermining plaintiffs' position still further.

All told, there is no reasonable basis to read the 2011 Agreement as plaintiffs suggest. Although it is certainly true that the rights reserved are explicitly carved out of the matters addressed section, there is no reading of the 2011 Agreement that would trigger the reservation of rights in this case. No portion of OU-2 is situated west of the Route 11 Bridge.
2011 Agreement, ¶ 100(ii). And though the Governments retained "all rights with respect to any site that is not a Property," they also covenanted not to sue for any liability asserted in the Proofs of Claim, which expressly include OU-2. *Id.* ¶ 100(vii).

Accordingly, the 2011 Agreement unambiguously resolved plaintiffs' liability concerning OU-2.[9] *Cf., e.g., Negrin*, 903 N.Y.S. 2d at 348 (rejecting contractual interpretation that depends on "formalistic literalism" in defiance of common sense and deprives other clauses of meaning). Since plaintiffs have failed to explain in the complaint or otherwise why the expanded territory should be treated any differently, plaintiffs' liability for that region

[9] In reaching this conclusion, the Court recognizes that the matters addressed and reservation of rights sections of the 2011 Agreement use language that is not quite perfectly congruent. The matters addressed section covers any costs "related to and in connection with" the Properties, while the reservation of rights covers "any site that is not a Property." 2011 Agreement, ¶¶ 100(vii), 105. In other words, each paragraph is written broadly enough to conceivably create some overlap. But the drafters' artlessness does not necessarily create an ambiguity. *In re Trusteeship Created by JER CRE CDO 2005-1, Ltd.*, 2013 WL 6916912, at *1 (S.D.N.Y. Dec. 31, 2013) ("[T]he mere fact that [a contract] may be complex or imperfect does not render [it] ambiguous"). The Governments unambiguously contemplated that their claims concerning OU-2 would be extinguished by the 2011 Agreement for all the reasons discussed. That is enough, and plaintiffs' reliance on an unduly literal reading of the contract does not disturb the analysis. *See RCJV Holdings, Inc. v. Collado Ryerson, S.A. de C.V.*, 18 F. Supp. 3d 534, 545 (S.D.N.Y. 2014) (noting that "contract interpretation is an exercise in 'common sense' rather than 'formalistic literalism'").

was also established by the same document. Putting those two conclusions together, the 2011 Agreement triggered § 113 claims for those areas all the way back in 2011. Those claims are now untimely.

2. Subsequent Agreements

Perhaps sensing that this outcome was possible, plaintiffs argue that even if the 2011 Agreement determined its CERCLA liability and gave rise to a § 113 claim, it does not necessarily follow that its CERCLA claims are defunct. As their next line of defense, plaintiffs argue thatthe 2015 Record of Decision and the 2021 Agreement alternatively resolved their CERCLA liability for OU-2 and the expanded territory. As a result, the statute of limitations should have restarted with either agreement, and in either case their claims would be timely.

That argument fails. From the outset, as far as the expanded territory is concerned, neither the 2015 Record of Decision nor the 2021 Agreement could possibly have established plaintiffs' liability. The 2021 Agreement says as much outright. Dkt. 334-25, ¶¶ 58, 72 (2021 Agreement explicitly excluding expanded territory from covenants not to sue and matters addressed).

As for the 2015 Record of Decision, this Court previously determined that that document did not resolve plaintiffs' liability as required to trigger a § 113 claim. *RACER I*, 2020 WL 2404770, at *12 ("[I]t can be stated to a certainty that the 2015 [Record of Decision] did not resolve plaintiffs'

liability.”). That conclusion was not rejected on appeal. *RACER II*, 10 F.4th at 104 (acknowledging district court’s reasoning concerning potential that § 113 claim is time-barred and remanding for clarity of basis for dismissal). Accordingly, the analysis concerning the 2015 Record of Decision is reincorporated here and forecloses any determination of liability as to the expanded territory from any contract other than the 2011 Agreement. *RACER I*, 2020 WL 2404770, at *12

Whether the 2021 Agreement resolved plaintiffs’ liability for OU-2 presents a closer question, but the result is the same. Remember, a § 113 claim comes into being once an entity “has resolved its liability to the United States or a state for some or all of a response action.” *Niagara Mohawk*, 596 F.3d at 124. In this case, the 2021 Agreement could not have resolved plaintiffs’ CERCLA liability for OU-2 because plaintiffs *had* no CERCLA liability for that area after the 2011 Agreement deemed that liability satisfied. *Cf. Goodwin*, 756 F.3d at 202 (noting that “resolution occurs when a [PRP] is released from CERCLA liability”).

In more traditional contractual terms, plaintiffs were given no consideration in the 2021 Agreement because their purported benefit—a release from CERCLA liability for the contamination in OU-2—was already theirs by virtue of the 2011 Agreement. *See Alessi Equip., Inc. v. Am. Piledriving Equip., Inc.*, --- F. Supp. 3d ----, 2022 WL 63165, at *10

(S.D.N.Y. Jan. 6, 2022) (noting that under New York law, consideration is essential to enforceable contract).

An empty promise cannot give rise to a § 113 claim. Otherwise, § 113's statute of limitations would be meaningless. The EPA is not going anywhere. It would be a simple enough matter for any party with a once-valid but now-expired contribution claim to go to the EPA, ask for a new consent decree covering the same subject matter, and brandish their new claim to gather funds from other PRPs.

That regime would run counter to CERCLA's objectives of expediting cleanups by incentivizing § 113 plaintiffs to promptly secure contribution from other PRPs to get remediation projects done as quickly as possible. *See Goodwin*, 756 F.3d at 202 ("[T]he principal purpose of limitations periods in [CERCLA cases is] 'ensuring that the responsible parties get to the bargaining—and clean-up—table sooner rather than later.'" (cleaned up) (citing *RSR Corp. v. Comm. Metals Co.*, 496 F.3d 552, 558 (2d Cir. 2007)). Plaintiffs' arguments relying on the 2015 Record of Decision and the 2021 Agreement must therefore be rejected.

3. *Atlantic Research*

Finally, plaintiffs argue that the Supreme Court in *United States v. Atlantic Research Corp.*, 551 U.S. 128, 139 n.6 (2007), left open the possibility that in certain circumstances §§ 107 and 113 claims may coexist. As a result,

plaintiffs believe that they still have § 107 claims available to them despite their failure to take advantage of their § 113 claims.

To plaintiffs' point, in *Atlantic Research*, the Supreme Court noted that in some circumstances, a PRP "may sustain expenses pursuant to a consent decree." 551 U.S. at 139 n.6. In a case of that sort, the PRP does not incur the costs voluntarily, but neither is it reimbursing the costs of another party. *Id.* Thus, the Supreme Court raised the specter of a possibility that a § 107 claim may remain viable even if a plaintiff had a § 113 claim at its disposal. *See id.*

According to plaintiffs, the hypothetical spun out by the Supreme Court matches the facts of this case perfectly. Thus, this Court should take the extraordinary step of holding for the first time that plaintiffs may recover under § 107 notwithstanding their failure to capitalize on their § 113 claim.

Defendants, predictably, disagree. To their point, plaintiffs have not pointed to a single case since *Atlantic Research* that actually permitted alternative claims under §§ 107 and 113. Most damning of all, the Second Circuit in this very case held that these two forms of CERCLA claim were mutually exclusive. *See RACER II*, 10 F. 4th at 103. That holding is binding and warrants dismissal on its own.

In any case, even given free rein to make new law, plaintiffs do not present a compelling case to carve out unique CERCLA liability to redeem

their claims. RACER is a special-purpose trust created specifically as a result of the 2011 Agreement to grapple with GM's contamination of Onondaga Lake. Similarly, plaintiffs were powerfully shaped by—and referenced heavily in—the 2011 Agreement, a consent decree under the auspices of CERCLA's authority.

In other words, plaintiffs were born in CERCLA's shadow, and molded by its mandates. Their one job was to navigate CERCLA to ensure that the IFG Plant was properly cleaned up. They, of all entities, should have known better than to let viable § 113 claims rot on the vine. They certainly do not deserve a jury-rigged escape valve now.

Accordingly, the 2011 Agreement established plaintiffs' CERCLA liability as to OU-2 and the expanded territory. As a consequence, plaintiffs were obligated to bring a claim for contribution within three years. But plaintiffs did not file their complaint until seven years later, in 2018. Dkt. 1. Plaintiffs thus cannot bring a § 107 claim for either area, and their § 113 claims are time-barred. Plaintiffs' other last-ditch efforts to escape this fate are without merit, and must be rejected. In sum, plaintiffs' CERCLA claims must be dismissed with prejudice.

B. <u>Remaining Claims</u>

At this point, it is worth noting that plaintiffs rely on supplemental jurisdiction under 28 U.S.C. § 1367 to keep their state law claims in this

District. However, a federal court has § 1331 jurisdiction over a state law claim if the state law claim grapples with a federal issue that is: "(1) necessarily raised[;] (2) actually disputed[;] (3) substantial[;] and (4) capable of resolution in federal court without disrupting the federal-state balance approved by congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). As a result, state law claims that deal with a party's compliance with a CERCLA consent decree which may preempt certain state law tort claims sometimes gives rise to federal question jurisdiction. *See Bartlett v. Honeywell Int'l Inc.*, 737 F. App'x 543, 546 (2d Cir. 2018) (summary order).

But that is not the case here. The parties do not dispute plaintiffs' compliance with—or the reach of—any consent decree. Critically, both parties also agree that plaintiffs may not recover under state law for any costs stemming from a cleanup of hazardous materials covered by CERCLA. In other words, the parties agree how CERCLA preemption works in a legal sense, but they dispute the extent to which CERCLA preemption comes into play on the facts alleged in the complaint.

In the absence of an actual dispute—let alone a substantial one—there is no federal legal question to give rise to § 1331 jurisdiction. *See, e.g., New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132, 1154-55 (D.N.M. 2020) (finding no federal question jurisdiction based on CERCLA

preemption because potential preemption would not result in complete foreclosure of state law claims).

As a result, plaintiffs' remaining claims abide in federal court based only on supplemental jurisdiction.[10] As was previously explained, a district court may "decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction[.]" 28 U.S.C. § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered . . . –judicial economy, convenience, fairness and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

This case did not warrant an exception to that usual rule before, and it does not now. *See RACER I*, 2020 WL 2404770, at *13. Plaintiffs' claims under New York's Navigation Law are far better left to the care of New York state courts. And in any case, discovery has not yet begun. Therefore, there is no cause to maintain jurisdiction over plaintiffs' state law claims. They must be dismissed without prejudice.

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[10] Once again, the Declaratory Judgment Act does not by itself confer subject matter jurisdiction. *Correspondent Servs. Corp. v. First Equities Corp. of Fla.*, 442 F.3d 767, 769 (2d Cir. 2006).

■ CONCLUSION

From the very start, plaintiffs' decision-making in this case has been troubling. Plaintiffs were created for the sole purpose of guiding the IFG Plant through remediation under CERCLA. And of course, CERCLA's purpose is to swiftly determine liability so that funds can be gathered to ensure that pollution is cleaned up.

Yet plaintiffs abandoned one of CERCLA's most valuable tools—a contribution claim that was available to them from the very beginning—for long years while they toiled alone. Plaintiffs cannot be rewarded for this perplexing failure. Especially not when the language of the 2011 Agreement so plainly signaled to them that a § 113 claim was available. Plaintiffs' CERCLA claims must be dismissed.[11]

Therefore, it is

ORDERED that

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[11] Certain defendants never appeared in this action. As a result, plaintiffs have requested entry of default against each of them. *See* Dkts. 366-371. Two points about this must be addressed. First, presumably plaintiffs moved for entry of default as a prelude to moving for default judgment. That effort would have been in vain. For default judgment to be proper, the allegations in the complaint and any other available evidence must suffice to establish a defendant's liability as a matter of law. *Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009). For the reasons explained above, though, plaintiffs' complaint actually serves the opposite end: it obviates any possibility of liability for any claim within this Court's jurisdiction. Second, in the usual case, a court cannot dismiss a complaint *sua sponte*. However, if a plaintiff was given a meaningful opportunity to be heard on grounds for dismissal, the complaint may be dismissed even for claims against defendants who have not moved. *See Alki Partners, L.P. v. Vatas Holding GMHB*, 769 F. Supp. 2d 478, 499 (S.D.N.Y. 2011) (noting that dismissal of claims under Rule 12(b)(6) rubric is permissible even in absence of motion so long as plaintiff was given opportunity to respond and dismissing complaint as to non-moving defendant). The defects the moving defendants pointed to go to the heart of plaintiffs' CERCLA claims, and plaintiffs failed to persuade the Court that those defects were not fatal. Accordingly, the complaint must be dismissed in its entirety.

1. Defendants' motion to dismiss plaintiffs' Second Amended Complaint is GRANTED;
2. Plaintiffs' claims under the Comprehensive Environmental Response, Compensation, and Liability Act coming under counts: (I) for cost recovery under § 107; (II) for contribution under § 113; (IX) for declaratory relief under the Federal Declaratory Judgment Act; and (X) for contribution under § 113 are DISMISSED with prejudice; and
3. Plaintiffs' state law claims under Counts: (III) response costs and damages under § 181(5) of the New York Navigation Law; (IV) contribution under § 176(8) of the New York Navigation Law; (V) negligence under New York common law; (VI) public nuisance under the New York common law; (VII) restitution under the New York common law; and (VIII) contribution or indemnification under New York common law are DISMISSED without prejudice; and
4. The Clerk of Court is directed to enter judgment accordingly and close the file.

IT IS SO ORDERED.

Dated: July 8, 2022
Utica, New York.

David N. Hurd
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

Racer Properties LLC, et al.
Plaintiff(s)

vs.

CASE NUMBER: 5:18-cv-1267 (DNH/ATB)

National Grid USA, et al.
Defendant(s)

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED 1. Defendants' motion to dismiss plaintiffs' Second Amended Complaint is GRANTED; 2. Plaintiffs' claims under the Comprehensive Environmental Response, Compensation, and Liability Act coming under counts: (I) for cost recovery under § 107; (II) for contribution under § 113; (IX) for declaratory relief under the Federal Declaratory Judgment Act; and (X) for contribution under § 113 are DISMISSED with prejudice; and 3. Plaintiffs' state law claims under Counts: (III) response costs and damages under § 181(5) of the New York Navigation Law; (IV) contribution under § 176(8) of the New York Navigation Law; (V) negligence under New York common law; (VI) public nuisance under the New York common law; (VII) restitution under the New York common law; and (VIII) contribution or indemnification under New York common law are DISMISSED without prejudice.

All of the above pursuant to the order of the Honorable **David N. Hurd**, dated this 8th day of July, 2022.

DATED: July 8, 2022

John Domurad
Clerk of Court

s/
Patsy Harvey
Deputy Clerk

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability (Refs & Annos)
Subchapter I. Hazardous Substances Releases, Liability, Compensation (Refs & Annos)

42 U.S.C.A. § 9607

§ 9607. Liability

Effective: March 23, 2018
Currentness

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is

demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed--

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33 or 46, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a), where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter

and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of a registered pesticide product

No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act, shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when--

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) Suspension of liability transfer

Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 9641 of this title prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) Study of options for post-closure program

(A) Study

The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 and assures the protection of human health and the environment.

(B) Program elements

The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) Assessments

The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to--

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) Procedures

In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) Consideration of options

In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to--

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act;

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) Recommendations

The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(l) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which--

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of Title 26.

(4) Action in rem

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(n) Liability of fiduciaries

(1) In general

The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity.

(2) Exclusion

Paragraph (1) does not apply to the extent that a person is liable under this chapter independently of the person's ownership of a vessel or facility as a fiduciary or actions taken in a fiduciary capacity.

(3) Limitation

Paragraphs (1) and (4) do not limit the liability pertaining to a release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

(4) Safe harbor

A fiduciary shall not be liable in its personal capacity under this chapter for--

(A) undertaking or directing another person to undertake a response action under subsection (d)(1) or under the direction of an on scene coordinator designated under the National Contingency Plan;

(B) undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the vessel or facility;

(C) terminating the fiduciary relationship;

(D) including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;

(E) monitoring or undertaking 1 or more inspections of the vessel or facility;

(F) providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;

(G) restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;

(H) administering, as a fiduciary, a vessel or facility that was contaminated before the fiduciary relationship began; or

(I) declining to take any of the actions described in subparagraphs (B) through (H).

(5) Definitions

As used in this chapter:

(A) Fiduciary

The term "fiduciary"--

(i) means a person acting for the benefit of another party as a bona fide--

(I) trustee;

(II) executor;

(III) administrator;

(IV) custodian;

(V) guardian of estates or guardian ad litem;

(VI) receiver;

(VII) conservator;

(VIII) committee of estates of incapacitated persons;

(IX) personal representative;

(X) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

(XI) representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in subclauses (I) through (X); and

(ii) does not include--

(I) a person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, 1 or more estate plans or because of the incapacity of a natural person; or

(II) a person that acquires ownership or control of a vessel or facility with the objective purpose of avoiding liability of the person or of any other person.

(B) Fiduciary capacity

The term "fiduciary capacity" means the capacity of a person in holding title to a vessel or facility, or otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

(6) Savings clause

Nothing in this subsection--

(A) affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this subsection; or

(B) creates any liability for a person or a private right of action against a fiduciary or any other person.

(7) No effect on certain persons

Nothing in this subsection applies to a person if the person--

(A)(i) acts in a capacity other than that of a fiduciary or in a beneficiary capacity; and

(ii) in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

(B)(i) is a beneficiary and a fiduciary with respect to the same fiduciary estate; and

(ii) as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

(8) Limitation

This subsection does not preclude a claim under this chapter against--

(A) the assets of the estate or trust administered by the fiduciary; or

(B) a nonemployee agent or independent contractor retained by a fiduciary.

(o) De micromis exemption

(1) In general

Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this chapter if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that--

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) Exceptions

Paragraph (1) shall not apply in a case in which--

(A) the President determines that--

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) No judicial review

A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) Nongovernmental third-party contribution actions

In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local government, under this chapter, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.

(p) Municipal solid waste exemption

(1) In general

Except as provided in paragraph (2) of this subsection, a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under paragraph (3) of subsection (a) for municipal solid waste disposed of at a facility if the person, except as provided in paragraph (5) of this subsection, can demonstrate that the person is--

(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

(B) a business entity (including a parent, subsidiary, or affiliate of the entity) that, during its 3 taxable years preceding the date of transmittal of written notification from the President of its potential liability under this section, employed on average not more than 100 full-time individuals, or the equivalent thereof, and that is a small business concern (within the meaning of the Small Business Act (15 U.S.C. 631 et seq.)) from which was generated all of the municipal solid waste attributable to the entity with respect to the facility; or

(C) an organization described in section 501(c)(3) of Title 26 and exempt from tax under section 501(a) of such title that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection, the term "affiliate" has the meaning of that term provided in the definition of "small business concern" in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

(2) Exception

Paragraph (1) shall not apply in a case in which the President determines that--

(A) the municipal solid waste referred to in paragraph (1) has contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility;

(B) the person has failed to comply with an information request or administrative subpoena issued by the President under this chapter; or

(C) the person has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility.

(3) No judicial review

A determination by the President under paragraph (2) shall not be subject to judicial review.

(4) Definition of municipal solid waste

(A) In general

For purposes of this subsection, the term "municipal solid waste" means waste material--

(i) generated by a household (including a single or multifamily residence); and

(ii) generated by a commercial, industrial, or institutional entity, to the extent that the waste material--

(I) is essentially the same as waste normally generated by a household;

(II) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and

(III) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

(B) Examples

Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

(C) Exclusions

The term "municipal solid waste" does not include--

(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

(ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.

(5) Burden of proof

In the case of an action, with respect to response costs at a facility on the National Priorities List, brought under this section or section 9613 of this title by--

(A) a party, other than a Federal, State, or local government, with respect to municipal solid waste disposed of on or after April 1, 2001; or

(B) any party with respect to municipal solid waste disposed of before April 1, 2001, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraphs (1) and (4) for exemption for entities and organizations described in paragraph (1)(B) and (C) are not met.

(6) Certain actions not permitted

No contribution action may be brought by a party, other than a Federal, State, or local government, under this chapter with respect to circumstances described in paragraph (1)(A).

(7) Costs and fees

A nongovernmental entity that commences, after January 11, 2002, a contribution action under this chapter shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o).

(q) Contiguous properties

(1) Not considered to be an owner or operator

(A) In general

A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if--

(i) the person did not cause, contribute, or consent to the release or threatened release;

(ii) the person is not--

(I) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

(II) the result of a reorganization of a business entity that was potentially liable;

(iii) the person takes reasonable steps to--

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(iv) the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

(v) the person--

(I) is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and

(II) does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

(vi) the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

(vii) the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

(viii) at the time at which the person acquired the property, the person--

(I) conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and

(II) did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person.

(B) Demonstration

To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(C) Bona fide prospective purchaser

Any person that does not qualify as a person described in this paragraph because the person had, or had reason to have, knowledge specified in subparagraph (A)(viii) at the time of acquisition of the real property may qualify as a bona fide prospective purchaser under section 9601(40) of this title if the person is otherwise described in that section.

(D) Ground water

With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters ground water beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

(2) Effect of law

With respect to a person described in this subsection, nothing in this subsection--

(A) limits any defense to liability that may be available to the person under any other provision of law; or

(B) imposes liability on the person that is not otherwise imposed by subsection (a).

(3) Assurances

The Administrator may--

(A) issue an assurance that no enforcement action under this chapter will be initiated against a person described in paragraph (1); and

(B) grant a person described in paragraph (1) protection against a cost recovery or contribution action under section 9613(f) of this title.

(r) Prospective purchaser and windfall lien

(1) Limitation on liability

Notwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the bona fide prospective purchaser being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

(2) Lien

If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs.

(3) Conditions

The conditions referred to in paragraph (2) are the following:

(A) Response action

A response action for which there are unrecovered costs of the United States is carried out at the facility.

(B) Fair market value

The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

(4) Amount; duration

A lien under paragraph (2)--

(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

(B) shall arise at the time at which costs are first incurred by the United States with respect to a response action at the facility;

(C) shall be subject to the requirements of subsection (l)(3); and

(D) shall continue until the earlier of--

(i) satisfaction of the lien by sale or other means; or

(ii) notwithstanding any statute of limitations under section 9613 of this title, recovery of all response costs incurred at the facility.

CREDIT(S)

(Pub.L. 96-510, Title I, § 107, Dec. 11, 1980, 94 Stat. 2781; Pub.L. 99-499, Title I, §§ 107(a) to (d)(2), (e), (f), 127(b), (e), Title II, §§ 201, 207(c), Oct. 17, 1986, 100 Stat. 1628 to 1630, 1692, 1693, 1705; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 103-429, § 7(e)(2), Oct. 31, 1994, 108 Stat. 4390; Pub.L. 104-208, Div. A, Title II, § 2502(a), Sept. 30, 1996,

110 Stat. 3009-462; Pub.L. 104-287, § 6(j)(2), Oct. 11, 1996, 110 Stat. 3400; Pub.L. 107-118, Title I, § 102(a), Title II, §§ 221, 222(b), Jan. 11, 2002, 115 Stat. 2356, 2368, 2371; Pub.L. 115-141, Div. N, § 5(b), Mar. 23, 2018, 132 Stat. 1054.)

42 U.S.C.A. § 9607, 42 USCA § 9607
Current through P.L. 117-166. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability (Refs & Annos)
Subchapter I. Hazardous Substances Releases, Liability, Compensation (Refs & Annos)

42 U.S.C.A. § 9613

§ 9613. Civil proceedings

Currentness

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced--

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after--

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run--

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that

the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of Title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of Title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(l) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

CREDIT(S)

(Pub.L. 96-510, Title I, § 113, Dec. 11, 1980, 94 Stat. 2795; Pub.L. 99-499, Title I, § 113, Oct. 17, 1986, 100 Stat. 1647; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

42 U.S.C.A. § 9613, 42 USCA § 9613
Current through P.L. 117-166. Some statute sections may be more current, see credits for details.

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